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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

TIDEWATER MARINE SERVICE, INC.
and WESTERN BOAT OPERATORS, INC.,
Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, AND DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, labor law enforcement officials for the State of California, have attempted to regulate the maximum working hours of seamen serving on petitioners' United States documented vessels operating on the high seas and within state territorial waters off the coast of California. Respondents have based their authority on a general state regulation which addresses the maximum hours of work for land-based employees. The questions for review are:

1. Are respondents' actions preempted by the express exemption of seamen from land-based maximum hour standards, as set forth in Section 13(b)(6) of the Fair Labor Standards Act, interpretive regulations adopted by the Department of Labor, and decisions by the Courts of Appeals?

2. Are respondents' actions preempted by the constitutional requirement of uniformity of federal admiralty law, as set forth in this Court's decisions in cases such as *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), and similar decisions by the Courts of Appeals?

3. Under this Court's decisions in cases such as *Oil Workers v. Mobil Oil Corp.,* 426 U.S. 407 (1976), and *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986), may respondents regulate the maximum hours of work for seamen whose predominant worksite is on the high seas beyond state territorial waters?

LIST OF PARTIES

The parties in the trial and appellate proceedings below were Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (appellees and plaintiff-intervenors); Lloyd W. Aubry, Jr., Labor Commissioner of the State of California, and Division of Labor Standards Enforcement, Department of Industrial Relations of the State of California (appellants and defendants); and Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine Service Association, Western Oil & Gas Association, and Clean Seas Association (appellees and plaintiffs).

Petitioners in this Court are Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (collectively referred to as "Tidewater"). Respondents are Lloyd W. Aubry, Jr., Labor Commissioner of the State of California, and Division of Labor Standards Enforcement, Department of Industrial Relations of the State of California (collectively referred to as "Aubry"). The remaining parties in the lower proceedings have not been named as respondents in this Court, as their interests are not adverse to ours, and we understand they will be filing their own separate petition for certiorari pursuant to Rule 19.4.

RULE 28.1 LIST OF RELATED CORPORATIONS

Petitioners Tidewater Marine Service, Inc. and Western Boat Operators, Inc. are wholly-owned corporate subsidiaries of Tidewater, Inc., a corporation whose stock is publicly traded. Although Tidewater, Inc. has a number of other subsidiary corporations related to petitioners, they are all wholly-owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (collectively "Tidewater") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 13, 1990.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeals are reported at 918 F.2d 1409 and are reprinted in the Appendix at A-1.

The opinion of the United States District Court for the Central District of California is reported at 709 F.Supp. 1516 and is reprinted in the Appendix at A-46.

JURISDICTION

The District Court's jurisdiction was based upon 28 U.S.C. § 1331 (federal question), § 1332 (diversity of citizenship) and § 1333(1) (admiralty). On March 1, 1989, the District Court granted petitioners' motion for summary judgment and entered declaratory and injunctive relief which prohibited respondents from enforcing state overtime regulations against seamen and maritime workers employed on the high seas and state territorial waters.

Respondents appealed the District Court's judgment pursuant to 28 U.S.C. § 1291 (final decisions). On November 13, 1990, the Ninth Circuit entered its judgment and majority opinion reversing the District Court, with a separate dissenting opinion. Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc on November 27, 1990. The petition for rehearing was denied by the Ninth Circuit on May 28, 1991. See Appendix at A-45.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) by praying for a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

STATUTES AND REGULATIONS INVOLVED

Section 13(b)(6) of the Fair Labor Standards Act, 29 U.S.C. § 213(b)(6), exempts seamen from land-based maximum hour and overtime standards. It reads:

> "The provisions of section 7 of this title [relating to maximum hours and overtime compensation] shall not apply with respect to —
>
> * * *
>
> (6) any employee employed as a seaman . . . . "

California Wage Order 4-80, 8 Cal. Code Regs. § 11040, regulates wages, hours and working conditions for professional, technical, clerical, mechanical and similar occupations. It is reprinted in the Appendix at A-68.

STATEMENT OF THE CASE

I.

BACKGROUND

Since the beginning of minimum wage, maximum hour and overtime laws more than fifty years ago, federal law has expressly exempted seamen from statutory overtime requirements. This principle is embodied in Section 13(b)(6) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(b)(6), a provision which Congress examined twice in extensive legislative hearings conducted in 1937 and 1961.[1] The seamen's exemption has

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[1]The FLSA originally exempted seamen from both minimum wage and overtime provisions. 52 Stat. 1067 § 13(a)(3), c. 676 (1938). In 1961 Congress amended the FLSA to apply the minimum wage to seamen, but it continued their overtime exemption. 75 Stat. 71, §§ 9 & 10 (1961). During both legislative sessions, Congress recognized the overtime exemption was appropriate because of the variable and

been refined by interpretive regulations issued by the Department of Labor, 29 C.F.R. §§ 783.29 *et seq.*, and by federal case law.

Federal cases and the FLSA legislative history have described two reasons for the longstanding exemption for seamen: (1) the pervasive degree of federal regulation which already exists over seamen's working conditions, hours of work, compensation and benefits, and (2) the variable and unpredictable nature of a seaman's workday, which does not lend itself to the rigid eight hour a day work standards inherent in land-based overtime regulations.[2]

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unscheduled working hours of seamen and the existing regulation of seamen's working conditions by federal maritime agencies. *E.g., Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 544-549 (1937); *Hearings on S. 256, S. 879, S. 895 and Bills Amending the FLSA Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 87th Cong., 1st Sess. 376-379 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 32-33 (1961). *See also,* 29 C.F.R. § 783.0 *et seq.* (discussing the FLSA legislative history).

[2]*E.g., Lowrimoore v. Union Bag & Paper Co.,* 30 F.Supp. 647, 652 (S.D. Ga. 1939), *aff'd,* 116 F.2d 27 (5th Cir. 1940), *cert. denied,* 313 U.S. 559 (1941) ("A valid reason which seems to justify leaving seamen out of the effects of this Act is the practical difficulty of establishing by any satisfactory evidence what were their hours of work, when they as employees were always or nearly always subject to call, though a large and indeterminate portion of their time was not occupied with work."); *Walling v. Keansburg Steamboat Co.,* 162 F.2d 405, 407 n.6 (3d Cir. 1947) ("Seamen were exempted from operation of the Fair Labor Standards Act of 1938 so as to avoid conflict of jurisdiction and confusion of labor relations."); *Anderson v. Manhattan Lighterage Corp.,* 148 F.2d 971, 973 (2d Cir.), *cert. denied,* 326 U.S. 722 (1945) (same holding); *Weaver v. Pittsburgh Steamship Co.,* 153 F.2d 597 (6th Cir.), *cert. denied,* 328 U.S. 858 (1946) (noting that maritime unions strongly advocated the seamen's exemption to

Because of this extensive body of federal law, the seamen's exemption from maximum hour and overtime standards has become a firmly established fixture of admiralty law. With the exception of California, every state has followed and respected the federal overtime exemption for seamen. Ten of the states have done so by express statutory provisions which largely incorporate Section 13(b)(6) of the FLSA.[3]

Although seamen's overtime compensation has been expressly excluded from labor law statutes, the subject has long been addressed by federal admiralty law. From the very beginning of our nation's history, the terms and conditions of seafaring work have been governed by the employment agreement between master and seaman, as enforced and interpreted by federal law.[4] Seamen's overtime compensation has accordingly been treated as a matter of contract between master and seaman.[5] And when a seaman performs duties beyond the working

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avoid confusion in jurisdiction and labor relations concerning maritime employees).

[3]Alaska Stat. § 23.10.060; 1989 Connecticut Pub. Acts No. 89-24 (Reg. Sess.); Hawaii Rev. Stat. § 387-3(a); Kansas Stat. Ann. § 337.050; Maine Rev. Stat. Ann., tit. 26, § 664; Massachusetts Gen. Laws Ann., ch. 151, § 1A; Minnesota Stat. § 177.23(7) (1)-(19); North Carolina Gen. Stat. 95-25.14(c); Pennsylvania Min. Wage Act § 5(b); Washington Rev. Code. § 49.46.130(1).

[4]*E.g.*, *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 46 (5th Cir. 1970); 1 Norris, *The Law of Seamen* § 6:1 (4th ed. 1985).

[5]*The Youngstown*, 28 F.Supp. 197, 199 (E.D. La. 1939), *aff'd*, 110 F.2d 968, 970 (5th Cir. 1940); *Jones v. American Export Isbrandtsen Lines, Inc.*, 285 F.Supp. 345, 346-47 (S.D.N.Y. 1968); *Kane v. American Tankers Corporation of Delaware*, 219 F.2d 637, 639 (2d Cir. 1955); *C.M. Rousseau, Jr. v. Teledyne Movable Offshore, Inc.*, 619 F.Supp. 1513, 1518-19 (D. La. 1985), *rev'd in part on other grounds*, 805 F.2d 1245 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987); *see*

period specified by contract, admiralty law recognizes an absolute right to fair compensation for the overtime performed.[6]

In addition, the Coast Guard regulates the maximum hours of work and specific working conditions of seamen serving on United States documented vessels. Following the standards set forth in the Shipping Act, the Coast Guard issues Certificates of Inspection which specify crewing requirements and the maximum hours of work at sea and in harbor conditions.[7] In the District Court proceedings, the Coast Guard Officer formerly in charge of the Southern California area submitted an undisputed declaration which described the Coast Guard's concern for the working conditions and maximum hours of work for seamen serving on United States documented vessels.[8]

II.

THE FACTS

This case arose in 1987, when California's labor law enforcement officials, Labor Commissioner Lloyd W. Aubry, Jr. and the Division of Labor Standards Enforce-

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also, Smith v. Reinauer Oil Transport, 256 F.2d 646, 652 (1st Cir. 1958).

[6]*The Lakme*, 93 F. 230, 231-32 (D. Wash. 1899); *Bender v. Waterman S.S. Corp.*, 69 F.Supp. 15, 19 (E.D.Penn. 1946); *The Carrier Dove*, 98 F. 313, 314 (D. Wash. 1899).

[7]46 U.S.C. §§ 8101 & 8104. Section 8104 is a recodification of 46 U.S.C. § 673, which was first enacted in 1915. *See* ch. 153, § 2, 38 Stat. 1164 (1915).

[8]Declaration of Captain Robert A. Janecek, USCG (Ret.), 31 CR 15-23. The declaration is reprinted in the Appendix at A-86.

ment (collectively "Aubry")[9] departed from the uniform practice of excluding seamen from overtime statutes. Aubry made this change by applying California Wage Order 4-80, 8 Cal. Code Regs. § 11040, to maritime employers operating in the Santa Barbara Channel off the coast of California.

Wage Order 4-80 says nothing about seamen, maritime workers or any other employees even remotely connected with the sea. It is instead a general regulation which applies to "professional, technical, clerical, mechanical and similar occupations," the definition for which is restricted to land-based employees such as accountants, clerks, librarians, dental technicians and secretaries. *See* 8 Cal. Code Regs § 11040 ¶ 2(c), Appendix at A-69-70.

Aubry first applied Wage Order 4-80 to maritime employees working for Clean Seas Association ("Clean Seas"). Clean Seas is an unincorporated association formed by major oil companies to contain and clean up marine oil spills in the Santa Barbara Channel. It operates three United States documented vessels which are crewed by officers and seamen licensed and certificated under federal law. One of the vessels is permanently stationed on a buoy approximately seven miles off the California coast, and the other two operate between local

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[9]Under California law, the Labor Commissioner is the chief officer of the Division of Labor Standards Enforcement. The Division has authority to investigate employee complaints concerning wages, hours and working conditions, and to resolve the complaints through informal administrative hearings held by deputy labor commissioners. Cal. Lab. Code §§ 79-105. Neither the Labor Commissioner nor the Division establish the state's minimum wage and maximum hour regulations, however. That function is performed by a separate agency, the Industrial Welfare Commission, which adopts Wage Orders through public rulemaking proceedings. Cal. Lab. Code §§ 1173-1182.1.

harbors and the high seas. Crew members live on board the Clean Seas vessels, serving approximately seven days on duty followed by seven days off.

In 1987 Aubry accepted overtime claims from twelve crew members of the Clean Seas vessels, rejecting Clean Seas' argument that Aubry's jurisdiction was preempted by federal admiralty law. In early 1988 Aubry issued overtime awards in favor of all the Clean Seas crew members, totaling $795,789.77. At the rate awarded, each crew member would have been entitled to approximately $70,000 in annual compensation.

Shortly after the award against Clean Seas, respondent Aubry accepted an overtime claim against Tidewater. Tidewater is a maritime firm which provides offshore transportation and support services throughout the world, and since 1964 it has provided crew and supply boat services to oil drilling platforms off the coast of California.

Tidewater's crew and supply vessels operate on the high seas and within state territorial waters.[10] In the Santa Barbara Channel, Tidewater provides transportation services to a number of oil drilling platforms lying from one to twelve nautical miles off the coast. This involves traditional seafaring activity and travel between the platforms and local harbors and from platform to platform. Tidewater's supply boats are 180 to 190 foot vessels and its crew boats are 65 foot vessels; both are

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[10]The United States exercises territorial rights over coastal waters up to three nautical miles from the low-water mark. The states may exercise limited police power functions within the territorial zone off their coasts, but the federal government has paramount rights and powers over the territorial seas. *United States v. California*, 332 U.S. 19 (1947).

equipped with a galley and living quarters for the crew. The vessels are on call twenty-four hours a day, resulting in work periods that are unscheduled and extraordinarily variable.

Crews on Tidewater's supply and crew vessels generally work a schedule consisting of seven days on duty followed by seven days off, and their duty periods correspond with manning requirements specified in the Shipping Act and the Coast Guard Certificates of Inspection. Although these duty periods often exceed eight hours in a twenty-four hour period, this reflects the fact that vessels are often inactive while waiting for a work assignment from platform operators. During these periods of inactivity, the vessel is docked or moored and crew members may sleep, eat, read, or otherwise engage in their own activities.

Tidewater's vessels and employees are subject to pervasive and uniform federal regulations. All of the vessels are federally documented, all masters are licensed by the Coast Guard, and all crew members have Merchant Mariner documents issued by the Coast Guard. Tidewater's vessels are inspected by the Coast Guard, which issues Certificates of Inspection specifying the manning requirements for twenty-four hour operation (including the number of crew and their maximum hours of work), the geographic area of operation, passenger or cargo limitations, and safety requirements. The Coast Guard also requires Tidewater to file monthly Certificates of Seaman's Service, describing the hours and capacity of work performed by each crew member.

Tidewater's crew members have the full range of protection and welfare benefits provided exclusively to seamen under federal admiralty law. They may seek recovery for injuries under the Jones Act, 46 U.S.C. § 688,

or for breach of the owner's duty to provide a seaworthy vessel, and they receive maintenance and cure benefits for illness or injury suffered during their period of service.

Throughout the twenty-four year period of Tidewater's operations in California, Tidewater's crew members have had employment agreements which provided for a flat daily rate of pay without overtime compensation. A daily rate of pay is the traditional method of compensating seamen used by Tidewater and other offshore maritime firms on United States documented vessels throughout the world, reflecting the variable hours of work by seamen and the prolonged periods of inactivity during a workday.

The administrative proceedings concerning Tidewater arose in February 1988, when Aubry accepted a complaint for overtime compensation filed by Frank Kleman in Santa Barbara. Kleman was employed as a deckhand on Tidewater's vessels in the Santa Barbara Channel under an employment agreement providing for a daily rate of pay without overtime compensation. Like Tidewater's other crew members, Kleman was a traditional seaman who held Merchant Mariner documents issued by the Coast Guard and enjoyed all seamen's benefits and protections afforded by federal law.

Aubry sought overtime compensation of approximately $50,000 for Kleman, covering one year of his employment with Tidewater. Since Kleman's annual earnings with Tidewater were about $25,000, the overtime represented two times his annual pay. As in the case of the complaint against Clean Seas, Aubry asserted jurisdiction over Tidewater on the basis of Wage Order 4-80. Tidewater made a timely motion to dismiss Kleman's overtime complaint on the ground of federal admiralty preemption, which Aubry denied. However, Aubry agreed to stay all

proceedings on the claim by Kleman (as well as other seamen) after Tidewater filed its complaint in this action.

III.

THE PROCEEDINGS BELOW

This action was filed in February 1988 by Clean Seas and several maritime trade associations concerned about Aubry's effort to regulate seamen. Plaintiffs' complaint sought declaratory and injunctive relief on the ground that Aubry's jurisdiction over seamen and maritime employees was preempted by federal admiralty law. The District Court permitted Tidewater to join in the action as a plaintiff-intervenor in June 1988.

Following cross-motions for summary judgment by the parties, the District Court (Judge A. Wallace Tashima) granted summary judgment in favor of Tidewater and the Clean Seas plaintiffs on March 1, 1989. The District Court declared that Aubry's jurisdiction over seamen was preempted by federal admiralty law and it issued a permanent injunction which prohibited Aubry from enforcing overtime regulations against seamen or maritime employees.

In reaching this result, the District Court followed the constitutional requirement of a uniform system of admiralty law, citing this Court's decisions in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). The District Court found that such uniformity was impossible because state and federal law "produce widely differing results" when applied to the seamen involved in this case. 709 F.Supp. at 1524, Appendix at A-61.

The District Court rejected Aubry's argument that state regulation of seamen was permitted by Section 18(a) of the FLSA, 29 U.S.C. § 218(a), a savings clause which permits states to enact a higher minimum wage or lower maximum workweek than federal law. The District Court held that Aubry's attempt to regulate overtime compensation for seamen impaired maritime uniformity because it squarely conflicted with the purpose and overall scheme of the seamen's exemption under the FLSA:

> "Congress has spoken directly on the issue of overtime pay for seamen. Therefore, California labor laws are preempted to the extent that they presume to regulate FLSA exempt seamen, both on the high seas and within the territorial zone. Further, given Congress' exemption of these seamen from even minimal federal overtime provisions, it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause." 709 F.Supp. at 1525; Appendix at A-64.

The Ninth Circuit reversed the District Court on November 13, 1990, issuing a majority opinion (by Judges Harry Pregerson and James R. Browning) and a separate dissenting opinion (by Senior Judge William P. Copple, sitting by designation). Unlike the District Court, the Ninth Circuit applied an unusually rigorous preemption standard, requiring evidence of a "*clear and manifest* purpose of Congress" to preclude state regulation. 918 F.2d at 1416, Appendix at A-11 (emphasis in original).

The Ninth Circuit's majority opinion found that Aubry's application of Wage Order 4-80 created maximum hour standards that differed sharply from those set forth in the Shipping Act, 46 U.S.C. § 8104, and enforced

by the Coast Guard. Nevertheless, the majority turned to an earlier Ninth Circuit decision involving a non-maritime conflict between state overtime laws and the Motor Carrier Act, 49 U.S.C. §§ 3101-04.[11] Relying on that decision, the majority held that Aubry's actions were not preempted because it was technically possible for Tidewater and Clean Seas to comply with both sets of laws. 918 F.2d at 1416-17, Appendix at A-13-14.

Like the District Court, the Ninth Circuit majority found a conflict between Aubry's regulations and the seamen's exemption under the FLSA. But the majority held that preemption was improper because there was no evidence that Congress had *expressly prohibited* state overtime regulation of seamen:

> "At no time has Congress expressly prohibited states from applying their overtime laws to seamen. Further, PMSA and Tidewater point to nothing in the legislative history of § 213(b)(6)— either in the 1938 act or in the 1961 amendments to the FLSA — that suggests that Congress intended to preclude application of state overtime provisions to seamen. Our review of legislative history has revealed no such congressional intent." 918 F.2d at 1418, Appendix at A-16 (footnote omitted).

The Ninth Circuit majority also considered whether the conflict between state and federal overtime standards violated the requirement of maritime uniformity described in this Court's decisions in *Jensen, supra*, 244 U.S. at 216, *Knickerbocker, supra*, 253 U.S. at 164, and *Tallentire, supra*, 477 U.S. at 228. The majority rejected the District Court's analysis and concluded that the federal

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[11] *Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987).

scheme of maritime regulation and interest in maritime uniformity were outweighed by California's interest in regulating seamen. In so holding, the majority once again pointed to Congress' failure to *expressly prohibit* state regulation of seamen and to the *local nature* of the maritime activity involved in this case:

> "There is no indication that Congress, in enacting the FLSA's savings clause, intended to preempt states from according more generous protection to maritime employees on the high seas off a state's coastal waters. Further, the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.
>
> "Most important, because the maritime employees involved in this action are California residents who work on vessels that operate exclusively off the California coast, application of the state's overtime law will not disrupt international or interstate commerce." 918 F.2d at 1425, Appendix at A-33-34 (emphasis in original).

One member of the Ninth Circuit panel dissented from the decision, concluding that Aubry's actions were preempted both by general principles of admiralty law and the FLSA. As for the former, the dissent argued that California overtime regulations conflicted with the long-standing admiralty principle that overtime is a matter of contract between master and seaman. The dissent noted that individual contractual arrangements are more suitable than fixed regulations to the variable conditions of maritime employment:

> "This interpretation makes sense in light of the fact that the conditions under which maritime employees work, especially those working on the high seas, are substantially different from land-based employees. Land-based employees are able to return home every night after work whereas often in maritime situations employees are required to be transported to a work station on the high seas, remain at sea for days at a time and subsequently be transported back to land. This aspect of maritime life has not changed for centuries and must have been understood at the inception of admiralty law." 918 F.2d at 1429, Appendix at A-41-42.

The dissent also concluded that Aubry's actions were preempted by the direct conflict between California overtime regulations and the seamen's exemption under the FLSA. Adopting the same analysis as the District Court, the dissent argued that Congress' specific decision to exempt seamen from overtime coverage did not leave room for contrary state regulation. 918 F.2d at 1430, Appendix at A-44.

REASONS FOR GRANTING THE WRIT

As we have explained, the subject of maximum hours and overtime compensation for seamen has not been excluded from federal admiralty law. It has instead been addressed in three ways: (1) seamen's overtime has historically been a matter of contract between master and seaman, (2) seamen's maximum hours of work have been regulated by the Shipping Act and the Coast Guard's manning standards and Certificates of Inspection, and (3) on two separate occasions Congress has specifically

excluded seamen from the land-based overtime standards of the FLSA.[12]

The Ninth Circuit majority has permitted Aubry to supersede this body of federal admiralty law by regulating the maximum hours and overtime compensation of seamen with a general land-based Wage Order that says nothing whatsoever about maritime employment. It has reached this anomalous result by applying a preemption analysis which directly conflicts with decisions of this Court and establishes new standards for state regulation of maritime employment on the high seas. The end result is a decision of enormous importance and widespread impact within the maritime industry. Certiorari is accordingly proper and should be granted.

I.

THE NINTH CIRCUIT MAJORITY OPINION APPLIES AN ADMIRALTY PREEMPTION ANALYSIS THAT CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS

A. The Ninth Circuit Majority Opinion Conflicts with *Jensen's* Requirement of Maritime Uniformity

This Court has long emphasized the need for uniformity in federal admiralty law, based upon the federal courts' responsibility for "all cases of admiralty and maritime jurisdiction." U. S. Const., art. III, § 2, cl. 1. The Court reiterated the need for maritime uniformity as recently as last term in *Miles v. Apex Marine Corp.*, ____ U.S. ____, 111 S.Ct. 317, 322, 112 L.Ed.2d 275 (1990), *quoting Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), and *The Lottawanna*, 88 U.S. 558, 575 (1874).

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[12]See discussion, *supra*, at pages 3-6.

The principle of maritime uniformity has led this Court to guard against intrusive regulation of maritime affairs by the states. For example, in the early case of *The Lottawanna, supra,* the Court declared:

> "One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed . . . ." 88 U.S. at 575.

In *Southern Pacific Co. v. Jensen, supra,* 244 U.S. at 217, the Court held that federal admiralty law preempted application of state workers' compensation laws to maritime employees because "[t]he necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously impeded." *Accord, Knickerbocker Ice Co. v. Stewart, supra,* 253 U.S. at 166; *State of Washington v. W. C. Dawson & Co.,* 264 U.S. 219, 227-28 (1924).

The majority decision by the Ninth Circuit is plainly inconsistent with these cases and with other decisions which have preempted fragmented state regulation of maritime activity.[13] If the states are not free to regulate

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[13] *E.g., Offshore Logistics, Inc. v. Tallentire, supra,* 477 U.S. 207 (1986) (refusing to apply state law to oil platform workers killed on the high seas); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978) (refusing to apply Washington design standards for oil tankers); *Kossick v. United Fruit Co.,* 365 U.S. 731 (1961) (refusing to apply

workers' compensation remedies for seamen and maritime workers, the result can be no different for seamen's maximum hours of work and compensation for overtime. In either instance maritime uniformity is destroyed by a system of fragmented and conflicting laws which differ greatly from federal admiralty law and which are subject to change from one state to another.

B. The Ninth Circuit Majority Opinion Incorrectly Requires Express Congressional Intent to Preclude State Regulation

The Ninth Circuit's majority decision conflicts with decisions of this Court not only in its overall holding, but also as to the particular form of preemption analysis which was applied. Throughout the decision, the majority was guided by "the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless that was the *clear and manifest* purpose of Congress." 918 F.2d at 1416, Appendix at A-11 (emphasis in original).

This form of preemption analysis is completely foreign to maritime law and entirely at odds with the constitutional requirement for maritime uniformity.[14] This Court's decisions have emphasized the practical consequences of

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New York statute of frauds to seaman's oral contract concerning medical care); *Union Fish Co. v. Erickson,* 248 U.S. 308 (1919) (refusing to apply California statute of frauds to a seaman's oral contract of employment); *Lord v. Goodall,* 102 U.S. 541 (1881) (refusing to apply California contract law in place of admiralty rules limiting a vessel owner's liability in a breach of contract action for damage to cargo).

[14]It also requires extraordinary foresight on the part of Congress. Because there were no states which even attempted to regulate overtime compensation for seamen in 1937 and 1961, Congress hardly had reason to consider the question of state preemption.

fragmented state regulation, not the need for express Congressional intent to preclude state action. Indeed, in *Jensen* and *Knickerbocker, supra,* the Court refused to permit enforcement of workers' compensation laws in the face of express Congressional intent to *permit* state regulation — simply because the practical consequence would produce fragmentation and confusion.

The approach taken by the Ninth Circuit majority also ignores the concept of "negative preemption" which this Court described in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978):

> "The Court has previously recognized that 'where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved . . .' States are not permitted to use their police power to enact such a regulation."

quoting Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774 (1947). *Accord, Napier v. Atlantic Coast Line,* 272 U.S. 605 (1926); *Norfolk & Western Ry. v. Pub. Utilities Comm.,* 926 F.2d 567, 570 (6th Cir. 1991); Friedell, *Benedict on Admiralty,* § 112, p. 7-37 ("As the Supreme Court has long recognized, the absence of a federal right of recovery may suggest a strong federal interest, and when a state 'supplements' the federal law by adding a cause of action it thereby deprives the defendant of a substantive right to be free of an obligation.").

This holding is certainly applicable here. Congress has expressly declared in Section 13(b)(6) of the FLSA that seamen should be exempt from land-based maximum hour and overtime standards. This was the product of legislative hearings in 1937 at which Congress accepted testi-

mony about the peculiar and variable working hours of seamen and the dangers of confusion between maritime and labor regulations.[15] Congress reexamined the issue in 1961, concluding that only the FLSA minimum wage provisions should be extended to seamen.[16] In short, Congress did not leave out seamen because of oversight or neglect — it carefully and deliberately drew a line that excludes seamen from land-based overtime regulations.[17]

The underlying rationale for Congress' exclusion of seamen from the FLSA applies with even greater force to state overtime laws. Land-based labor standards, whether state or federal, are equally inappropriate for the variable workday of a seaman. And there is much greater opportunity for confusion between labor and maritime regulations when multiple state jurisdictions are involved.

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[15] *See* legislative materials, *supra,* note 1 at page 3.

[16] When applying the minimum wage to seamen, Congress was careful to enact special provisions which recognize the unique working hours of seamen. Section 6(a)(4) of the FLSA accordingly prescribes a special minimum wage computation for seamen, based upon the hours they are "actually on duty" and not just on call. 29 U.S.C. § 206(a)(4). *See also,* S.Rep. No. 145, 87th Cong., 1st Sess. 32-33 (1961) (explaining legislative intent).

[17] That line has been extended by a substantial body of law, consisting of federal regulations and court decisions, which define the precise scope of the seamen's exemption. Following the intent of Congress, they distinguish land-based and traditional seafaring activity by applying the seaman's exemption only to "one who performs service primarily to aid in the operation of a vessel as a means of transportation." *Worthington v. Icicle Seafoods, Inc.,* 774 F.2d 349, 353 (9th Cir. 1984), *vacated on other grounds,* 475 U.S. 709 (1986); *Donovan v. Nekton, Inc.,* 703 F.2d 1148 (9th Cir. 1983); 29 C.F.R. § 783.29.

C. The Ninth Circuit Majority Opinion Incorrectly Applies a More Lenient Preemption Standard to Maritime Operations in Local Waters

In upholding A..ory's regulation of seamen, the Ninth Circuit majority emphasized that preemption was improper because the affected employees were California residents who worked on vessels operating in local waters off the California coast. 918 F.2d at 1425, Appendix at A-34. This aspect of the majority's preemption analysis constitutes a sharp departure from decisions of this Court.

Federal admiralty jurisdiction includes all navigable waters which may be used in commerce.[18] This Court's decisions have recognized the need for maritime uniformity wherever admiralty jurisdiction extends, with equal attention to state territorial waters and the high seas. *E.g., Moragne v. States Marine Lines, Inc., supra,* 398 U.S. 375 (establishing a uniform federal maritime remedy for wrongful death within state territorial waters).

Unlike the Ninth Circuit majority, this Court has recognized no lesser standard of preemption for vessels operating in local waters. *Lord v. Goodall*, 102 U.S. 541 (1881), held that federal admiralty law preempted state statutes concerning a vessel which operated an exclusive route between San Francisco and San Diego off the coast of California. Similarly, in *London Co. v. Industrial Commission*, 279 U.S. 109 (1929), the Court found preemption of

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[18] *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 41 (1942) ("It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country."); G. Gilmore and C. Black, *The Law of Admiralty* § 1-11 at 31 (2d ed. 1975).

state law concerning an accident which occurred only three-quarters of a mile off the coast of California.

By the same token, the Court has applied preemption even when there are strong local contacts between a maritime transaction and a particular state. In *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919), the Court refused to apply California's statute of frauds to a seaman's oral contract of employment made within the state, holding that maritime uniformity would have been defeated by fragmented state regulation. The Court reaffirmed that holding more than forty years later in the face of even stronger local contacts in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

D. The Ninth Circuit Majority Opinion Creates Unprecedented and Expansive Powers for State Regulation of Maritime Activity on the High Seas

The issues in this case involve application of state overtime regulations to vessels which normally operate on the high seas. Tidewater's vessels regularly travel between oil platforms up to twelve miles off the coast, and they are permitted by the Coast Guard Certificates of Inspection to operate up to 100 miles from the mainland shore. The District Court accordingly made it clear that Aubry is attempting to regulate seamen "employed on vessels situated primarily on the high seas," and the Ninth Circuit agreed. 709 F.Supp. at 1517, 918 F.2d at 1415, Appendix at A-46 & 11.

In *Oil Workers v. Mobil Oil Corp., supra*, 426 U.S. 407, this Court decided whether the National Labor Relations Act savings clause, 29 U.S.C. § 164(b), permitted application of the Texas right-to-work laws to seamen employed on United States documented oil tankers operating principally on the high seas. The lower courts held that Texas

law applied because of the substantial state interests in regulating the seamen's employment and the predominant state contacts with the hiring and employment process. This Court reversed, holding that the predominant job situs was the proper standard for measuring applicability of state law. Since the vessels operated primarily on the high seas, the Court held that neither Texas nor any other state had a sufficient interest in the employment relationship to apply its state laws. 426 U.S. at 412-21.

The Court took a similar approach in *Offshore Logistics, Inc. v. Tallentire, supra*, 477 U.S. 207. That case involved the question whether the savings clause under the Death on the High Seas Act, 46 U.S.C. § 761, permitted application of the Louisiana wrongful death statute to oil platform workers killed in a helicopter crash on the high seas. Despite extensive contacts between the workers and Louisiana, the Court held that state law did not apply. Emphasizing the importance of uniform maritime remedies for death on the high seas, the Court interpreted the savings clause as permitting state court jurisdiction over wrongful death actions but precluding application of state substantive law. 477 U.S. at 220-233.

The decision by the Ninth Circuit majority is plainly at odds with *Mobil Oil* and *Tallentire*. The majority decision permits Aubry to apply state overtime standards to seamen whose predominant workplace is on the high seas and beyond state territorial waters. This cannot be reconciled with the heightened need for maritime uniformity on the high seas, which was a decisive factor in *Mobil Oil* and *Tallentire*.

Because of the strong local interest in protecting the shoreline from environmental harm, some of this Court's decisions have permitted limited state regulation of shipping activity — but only within the three-mile state terri-

torial zone. *See Ray v. Atlantic Richfield Co., supra*, 435 U.S. 151 (permitting application of a state statute concerning tug-escorts for certain tankers in confined waters); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (permitting application of a state statute concerning oil spill damage to the shoreline); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (permitting application of city air pollution regulations to tankers within a harbor).

The Ninth Circuit's majority decision dramatically expands this limited authority by permitting state regulatory activity on the high seas and beyond the state territorial zone. That expansive interpretation is neither permitted by this Court's decisions nor consistent with *Mobil Oil* and *Tallentire*.

II.

THIS CASE INVOLVES IMPORTANT ISSUES AFFECTING FEDERAL ADMIRALTY LAW AND THE MARITIME INDUSTRY

A. The Ninth Circuit Majority Opinion Will Have Great Impact in the Maritime Industry

This is by no means a case with limited importance or application. Because these proceedings arose in California, this case necessarily has a great impact on the United States maritime industry. According to figures compiled by the Bureau of Labor Statistics, more than 11.31 percent of all United States maritime employees are based in California.[19]

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[19]U.S. Dept. of Labor, Bureau of Labor Statistics, Employment & Wages Annual Averages 1989 (Bull. 2373, October 1990), at pp. 326-331.

The State of California has a similarly disproportionate share of maritime employees in the offshore sub-industries that will be most affected by Aubry's jurisdiction: water transportation services (10.96% of all U.S. employees), water passenger transportation (10.59% of all U.S. employees), water ferries (12.10% of all U.S. employees), marine cargo handling (15.29% of all U.S. employees), and towing and tugboat services (7.05% of all U.S. employees).[20]

In one fell swoop, the Ninth Circuit majority decision has accordingly removed the longstanding seamen's exemption for more than one out of every ten offshore maritime employees in the United States. The impact will of course be greater if Wage Order 4-80 is applied more broadly to deep water maritime employees in California,[21] or if additional states apply their overtime provisions to offshore or deep water vessels. As the Ninth Circuit includes all states bordering the Pacific Coast, the precedential effect of this case would expressly permit all of those states to apply their overtime laws (and perhaps other labor regulations) to seamen as well.[22]

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[20] *Id.*

[21] This is by no means a hypothetical possibility, for as the District Court found, Aubry has claimed the right to regulate seamen who are non-California residents and seamen who serve on vessels operating outside the territorial waters of California. 709 F.Supp. at 1521, Appendix at A-53-54.

[22] The Ninth Circuit majority opinion also serves to add confusion to legal principles governing federal maritime preemption of state laws. Commentators have already recognized this to be an area of great confusion in need of clarification by this Court. *E.g.*, Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158 (1960); Ruhl, *Finding Federalism in the Admiralty: 'The Devil's Own Mess' Revisited*, 12 Tul. Maritime L.J. 263 (1988).

From an economic and operational standpoint, the Ninth Circuit's decision will also have an enormous impact on maritime employers. The Shipping Act and Coast Guard Certificates of Inspection for offshore vessels now set a maximum work period of twelve hours per day on crew and supply boats like those operated by Tidewater.[23] As the Coast Guard Officer who submitted a declaration to the District Court explained, reliance upon these federal standards has created an accepted and customary twelve hour work day throughout the offshore maritime industry.[24]

Continuing these customary practices in the face of Aubry's state overtime regulations is simply not a feasible alternative. Wage Order 4-80 requires premium overtime pay at one and one-half or two times the regular rate of pay for work exceeding eight hours in any day, the first eight hours on the seventh day of work, and forty hours in any week. 8 Cal. Code Regs. § 11040, ¶ 3(A), Appendix at A-71-72. The customary twelve hour workday would therefore produce at least four hours of premium pay *each day* (or six additional hours of regular pay at the one and one-half overtime rate) — resulting in seamen earning considerably more than the master of their vessels. The full measure of the economic disruption is shown by Aubry's overtime awards against Clean Seas and complaint against Tidewater, which resulted in total compensation

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[23]46 U.S.C. § 8104(b); Declaration of Capt. Robert A. Janecek, USCG (Ret.) at ¶ 11, Appendix at A-88-89.

[24]Janecek Declaration, *supra*, at ¶ 13, Appendix at A-89-90 ("In all of the years I have been involved in supervising the manning requirements for crew boats and supply boats of the type operated by Tidewater, I have always considered and understood the twelve hour shift to be the normal workday for seamen (including officers) serving on these type vessels.").

nearly *three times* the seamen's base earnings which they contracted for.[25]

The economic pressures caused by Aubry's maximum hour standards would accordingly require maritime employers to restructure seamen's work periods to come closer to the land-based standards prescribed by Wage Order 4-80, without regard to the operational needs of the vessels or their work. This will necessarily require premium overtime pay, the employment of a greater number of seamen, and correspondingly higher costs to maritime employers.

These dramatically higher employment costs would have a depressing impact on individual maritime employers and the entire industry. During the past three decades, United States maritime employment has declined sharply and steadily. The Bureau of Labor Statistics reports that the number of United States maritime employees has dropped 22.6 percent between 1964 and 1989.[26] Quite clearly, the industry does not need an additional economic burden to enhance this downward spiral.

B. The Ninth Circuit Majority Opinion Will Create Confusion and Uncertainty

Presently there are uniform conditions in maritime employment on United States documented vessels throughout the world: maximum hours are determined by the Shipping Act and Coast Guard Certificates of Inspection, seamen are exempt from statutory overtime provi-

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[25] *See* discussion, *supra* at pages 8 and 10.

[26] U.S. Dept. of Labor, Bureau of Labor Statistics, Employment, Hours, & Earnings, United States, 1909-90 (Bull. 2370, March 1991), at pp. 706-707.

sions, and overtime compensation is a matter of contract. By permitting Aubry to apply Wage Order 4-80 to seamen in California, this uniformity will be destroyed and replaced by confusion and uncertainty.

Wage Order 4-80 is a completely inappropriate tool for regulating the work of seamen and maritime employees. It expressly applies to "professional, technical, clerical, mechanical and similar occupations," which the order describes as employees such as office workers, cashiers, librarians, salespersons and bank tellers. 8 Cal. Code Regs. § 11040, ¶ 2(C), Appendix at A-69-70. Seamen on Tidewater's vessels have nothing in common with these land-based employees or with the nine-to-five workday that they typically follow. Seamen in the offshore maritime industry often live aboard their vessels and always have prolonged periods of inactivity and rest. Wage Order 4-80 takes none of these unique working conditions into account.

The Ninth Circuit majority opinion is based on the unrealistic assumption that maritime employers can easily identify the vessels and crew members to which state regulations like Wage Order 4-80 would apply. But vessels are moving worksites which commonly operate between states or in gulfs, rivers and bays that cannot be clearly identified with any particular jurisdiction. And crews are commonly composed of seamen who reside in different states. Under these circumstances typical of maritime employment, governing work and overtime standards would differ according to the location of the vessel or the residence of each crew member. These distinctions are unworkable and impossible to administer effectively.

The resulting confusion would expand in geometric proportions if other states followed the lead of California by applying their overtime regulations to seamen. By way

of example, there is no uniform state maximum hour standard among the Pacific Coast states. Washington and Oregon recognize the forty hour work week as their standard for maximum hours of work, but Alaska and California limit work to eight hours in any twenty-four hour period.[27] If these variable state regulations are applied to vessels operating along the Pacific Coast or to maritime employers like Tidewater with vessels in more than one state, it will be necessary to comply with different overtime standards depending upon the waters in which a vessel is located.

In short, the existing maximum hour standards of the Shipping Act and the Coast Guard are much better suited to maritime employment. Since 1915, Congress has consistently mandated the maximum hour standards for seamen serving on United States documented vessels, through its enactment of statutes such as 46 U.S.C. § 8104. And Congress has given the Coast Guard the exclusive authority to determine the manning and hours standards aboard vessels operating in state, federal and international waters, through individual Certificates of Inspection based upon federal law and a careful evaluation of each vessel and its working conditions. Through this comprehensive federal scheme, Congress has recognized that Coast Guard officers — not state authorities — are experts who know the sea and the unique conditions under which vessels and their crews operate. For more than fifty years Congress has therefore exempted seamen from the FLSA's maximum hours and overtime provisions, expressly recognizing that special rules must apply to maritime employment.

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[27]Wash. Rev. Code § 49.46.130(h); Or. Rev. Stat. § 653.261; Alaska Stat. § 23.10.060; 8 Cal. Code Regs. §§ 11010-11150 at ¶ 3(A).

Allowing Aubry and other state officials to suddenly and arbitrarily redefine the customs and practices in the maritime industry and displace the Shipping Act and Coast Guard expertise is flatly inconsistent with this Court's directive to maintain uniform and consistent principles of federal admiralty law. Aubry's effort to regulate the unique working conditions of seamen with a Wage Order that applies to librarians and bank tellers is a clear conflict with federal maritime law which will wreak havoc in the maritime industry. It is a classic case of someone stubbornly trying to pound a square peg into a round hole — with profound confusion and cost to all who are affected.

CONCLUSION

For the foregoing reasons, review by this Court is appropriate and certiorari should be granted.

Respectfully submitted,

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July 17, 1991

APPENDIX

FOR PUBLICATION

United States Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC MERCHANT SHIPPING ASSOCIATION;
AMERICAN INSTITUTE OF MERCHANT SHIPPING;
OFFSHORE MARINE SERVICE ASSOCIATION;
WESTERN OIL AND GAS ASSOCIATION;
CLEAN SEAS,
Plaintiffs-Appellees,

vs.

LLOYD W. AUBRY, JR.,
Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,
Defendant-Appellant,

vs.

TIDEWATER MARINE SERVICE, INC.;
WESTERN BOAT OPERATORS, INC.,
Plaintiff/Intervenors-Appellees.

No. 89-55379 D.C. No. CV-88-0848-AWT

OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
June 5, 1990 — Pasadena, California

Filed November 13, 1990

Before: James R. Browning and Harry Pregerson, Circuit Judges, and William P. Copple, District Judge.*

*The Honorable William P. Copple, Senior United States District Judge, District of Arizona, sitting by designation.

OPINION

PREGERSON, Circuit Judge:

Lloyd W. Aubry ("Aubry"), California's labor commissioner, enforced California's overtime pay laws against Clean Seas, an employer operating vessels off the California coast. Pacific Merchant Shipping Association and other shipping associations[1] ("PMSA") brought suit in the district court on behalf of Clean Seas and other member companies, seeking declaratory and injunctive relief on the ground that California's overtime pay laws are preempted by federal admiralty law. Tidewater Marine Service, Inc., and Western Boat Operations, Inc. ("Tidewater") intervened in the action after an employee filed an overtime wage claim with the California Division of Labor Standards Enforcement. The district court granted summary judgment for PMSA and Tidewater, declared Aubry's actions preempted by federal admiralty law, and enjoined further enforcement of California's overtime pay laws against Clean Seas, Tidewater, and other maritime employers. *Pacific Merchant Shipping Ass'n v. Aubry,* 709 F. Supp. 1516 (C.D. Cal. 1989). We have jurisdiction over the district court's final order under 28 U.S.C. § 1291. We reverse.

BACKGROUND

I. Admiralty Terminology

At the outset, and for the sake of clarity, we explain basic admiralty terminology used by the district court and in this opinion.

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[1]American Institute of Merchant Shipping; Offshore Marine Service Association; Western Oil and Gas Association.

A. Maritime Employees:

Historically, those who work on ships have been called "seamen." As a matter of general maritime law, the term "seamen" includes a broad range of marine workers whose work on a vessel on navigable waters contributes to the functioning of the vessel, to accomplishment of its mission, or to its operation or welfare. *See* 46 U.S.C. § 10101(3); Norris, *The Law of Seamen,* §§ 2.1, 2.3, 2.10 (4th ed. 1985). "Seamen" is also used, in a much narrower sense, in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, to define a category of maritime workers *exempted* from coverage under federal overtime pay provisions. *See* 29 U.S.C. § 213(b)(6).[2] Under federal regulations, a "seaman" exempted from the FLSA's overtime pay provisions is one who works "primarily as an aid in the operation of [a] vessel as a means of transportation, provided he performs no substantial amount of work of a different character." *See* 29 C.F.R. § 783.31 (1989). A "substantial amount of work of a different character" is more than 20 percent of the time worked by an employee during any given work week. 29 C.F.R. § 783.37 (1989).

This appeal involves workers who are FLSA-exempt "seamen" and workers who, while not exempted from the FLSA's overtime pay provisions, are still "seamen" in the broader, general sense. Because the distinction is impor-

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[2]Under the FLSA, with certain exceptions, all hours worked in excess of 40 hours per week must be compensated at "a rate not less than one-and-one-half times the regular rate." 29 U.S.C. § 207(a)(1). The statute also provides in relevant part:

> The provisions of section 207 of this title shall not apply with respect to —
>
> (6) any employee employed as a seaman . . . .

29 U.S.C. § 213(b).

tant, and to avoid confusion, we use the following terms to describe the employees affected by this opinion: a "maritime employee" is a "seaman" in the general maritime sense; and a "seaman" is a maritime employee exempted from the FLSA's overtime pay provisions under 29 U.S.C. § 213(b)(6).

B. Seas:

Two zones of "navigable waters" are involved in this appeal. The "territorial sea" is the sea from shore to three nautical miles off shore. The "high seas" are ocean waters outside the territorial sea, i.e., more than three miles offshore.

C. Voyages:

The Shipping Act, 46 U.S.C. §§ 2101-14701, divides "voyages" into three types. "Foreign voyages" are voyages between ports in the United States and ports in foreign countries (except Canada, Mexico, and the West Indies). *See* 46 U.S.C. § 10301(a)(1). "Intercoastal voyages" are voyages between ports on the Atlantic and Pacific coasts. *See* 46 U.S.C. § 10301(a)(2). "Coastwise voyages" are voyages "between a port in one State and a port in another State (except an adjoining State)." *See* 46 U.S.C. § 10501(a). United States Coast Guard regulations define "coastwise vessels" as those "normally navigating the waters of any ocean or the Gulf of Mexico 20 nautical miles or less offshore." 46 C.F.R. § 70.10-13 (1988).

II. Facts and Procedural History

PMSA and the other associations involved in this appeal are maritime trade associations that represent merchant maritime shippers, other maritime employers,

and employers in the oil and gas industry. Among these organizations' members are Clean Seas and Tidewater. Clean Seas is an unincorporated, cooperative association, formed by several major oil companies to contain and clean up marine oil spills off the California coast. Tidewater provides offshore transportation and support services worldwide, and provides transportation services to oil drilling platforms from one to 12 nautical miles of the California coast.

Clean Seas operates three vessels: *Mr. Clean, Mr. Clean II,* and *Mr. Clean III.* The employees whose wage claims led to this appeal work on *Mr. Clean II* and *Mr. Clean III* (three on *Mr. Clean II;* nine on *Mr. Clean III*). Both vessels' duties involve control and clean up of oil spills and other environmentally hazardous discharges in the Santa Barbara Channel off the California coast. *Mr. Clean II* is a 138-foot vessel moored in Port San Luis Harbor, California, where it remains moored approximately one-quarter mile offshore about 90 percent of the time. *Mr. Clean III* is a 181-foot vessel permanently stationed on the high seas off the California coast. *Mr. Clean III* conducts containment and clean up operations around four oil drilling and production platforms over the Pedernales and Arguello oil fields, from four to ten nautical miles off the California coast. When not on active duty, *Mr. Clean III* is tied to a buoy approximately seven miles off the California coast.

Clean Seas employees who work on *Mr. Clean III* are organized into two crews of six.[3] Each crew works seven day "hitches" at sea, alternating with seven day rest periods on shore. While at sea, Clean Seas employees

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[3]The record does not indicate whether *Mr. Clean III* crewmembers are organized this way.

typically work 12 hour shifts, alternating with 12 hour rest periods. *Mr. Clean III* crew members are transported to the vessel by helicopter from the Santa Barbara Airport. Of the 12 Clean Seas employees involved in the underlying action, two were licensed "mates" and ten, who worked primarily on clean up operations, were certified as "seamen" by the United States Coast Guard.[4] The specific terms of Clean Seas' employees' work are usually set out in contracts negotiated between each employee and Clean Seas.

Tidewater operates two types of vessels off the California coast. Tidewater's supply boats are 180- to 190-foot vessels with seven-member crews that pick up and deliver cargo at the Port Hueneme Pier, south of Santa Barbara, for delivery at various offshore oil platforms. Tidewater's crew boats are 65-foot vessels with two-member crews that transport passengers, light supplies and mail from

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[4]Under applicable federal regulations, the United States Coast Guard inspects vessels and issues certificates to qualifying maritime employees. *See* 46 C.F.R. §§ 71.01-71.75 (1988). A "mate" is a "qualified officer in the deck department other than the master." 46 C.F.R. § 10.103 (1989). Marine employees are certified as "seamen" upon meeting a range of age and training requirements. 46 C.F.R. §§ 12.01-1 to 12.25-40 (1989). Certification as a "seaman" under Coast Guard regulations does not bear on an employee's status as a "seaman" for purposes of exemption from federal overtime laws under 29 U.S.C. § 213(b)(6). *See* 29 C.F.R. 783.31-.37 (1989).

The district court made no findings on the question whether Clean Seas' employees were FLSA-exempt seamen. That question is one of fact, and must be decided by the district court. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, *on remand, Worthington v. Icicle Seafoods, Inc.*, 796 F.2d 337 (9th Cir. 1986). In this case, however, because we hold that California may apply its overtime provisions to both the FLSA-exempt seamen and the non-exempt maritime employees involved in this suit, we need not remand the case to the district court to determine the status of Clean Seas' employees.

the Carpinteria and Ellwood piers, also near Santa Barbara, to offshore oil platforms. These vessels are on call at all times. When a vessel is called, it goes to a pier to pick up cargo or passengers, travels to its destination, and then returns to the pier.

The employee whose wage claim led to Tidewater's intervention in this action was a deck engineer on a crew boat. The parties agree that the employee is a seaman exempted from the FLSA's overtime provisions under 29 U.S.C. § 213(b)(6). Typically, Tidewater crew boat crews work 7 day hitches alternating with 7 day rest periods onshore; employees work 12 hour shifts alternating with 12 hour rest periods. The specific terms of most Tidewater crew members' work are set out in employment contracts negotiated between individual employees and Tidewater.

The record indicates that all the Clean Seas employees and the Tidewater employee are California residents who live in California when not on board ship. The workers are hired in California, receive paychecks at California addresses, and pay California taxes.

In 1987, the twelve Clean Seas employees filed claims for unpaid overtime compensation with the California Labor Commissioner. The California Labor Code grants the Labor Commissioner authority to enforce Wage Orders issued by the California Industrial Welfare Commission ("IWC"). *See* Cal. Lab. Code §§ 98, 1173. IWC Wage Order 4-80 sets out wage and overtime requirements with respect to "professional, technical, clerical, mechanical, and similar occupations." Cal. Code Regs. § 11345(2)(c). After a hearing, Aubry applied Wage Order 4-80 to the Clean Seas crewmembers and granted an average of $45,000 in back wages to each of the 12 Clean Seas employees. PMSA then filed the complaint for declaratory and injunctive relief underlying this appeal. Meanwhile,

in February 1988, Frank Kleman, the Tidewater employee, filed a claim for $50,000 unpaid over-time compensation (for a 12-month period) with the California Labor Commission. Tidewater then intervened in PMSA's federal court action. Kleman's case and all other similar administrative claims were stayed pending the outcome of the federal court action.

After a hearing on cross-motions for summary judgment, the district court granted PMSA and Tidewaters' request for declaratory and injunctive relief, holding that California cannot apply its overtime provisions to maritime employees employed primarily on the high seas or to seamen. 709 F. Supp. at 1526. The district court enjoined all enforcement of California's overtime pay provisions against employers of these maritime workers.

Aubry filed a timely notice of appeal.

JURISDICTION AND SCOPE OF RELIEF

Because PMSA and Tidewaters' complaints sought to enjoin enforcement of California law based on federal preemption, this case "arose under" federal law, and the district court properly exercised jurisdiction over PMSA's action for injunctive relief. *See Southern Pac. Transp. Co. v. Public Utils. Comm'n of State of Cal.,* 716 F.2d 1285, 1288-89 (9th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96 n.14 (1983).

Actions for declaratory and injunctive relief, however, must be carefully limited in scope to meet the "case and controversy" requirements of Article III of the Constitution. *O'Shea v. Littleton,* 414 U.S 488, 493-95 (1974); *Maryland Casualty Co. v. Pac. Coal and Oil Co.,* 312 U.S. 270, 273 (1941). Before the district court, PMSA, Tide-

water, and Aubry argued at length over the precise scope of the declaratory and injunctive relief action. PMSA and Tidewater sought a ruling on all employees of its members with respect to a broad range of California labor code provisions. 709 F. Supp. at 1522-23. Aubry, on the other hand, sought to limit the scope of the action to only those employees to which he had applied California's overtime provision. *Id.*

Applying the constitutional rule that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," *Babbit v. United Farm Workers Nat'l Union,* 442 U.S 289, 298 (1979), the district court limited the scope of relief to cover only application of California's overtime pay laws to (1) FLSA-exempt seamen, whether working within the territorial zone or on the high seas; and (2) maritime employees working primarily on vessels on the high seas that are not engaged in foreign, intercoastal, or coastwise voyages. 709 F. Supp. at 1522-23,-1526.[5] The district court expressly stated that

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[5]There is some ambiguity in the record and in the district court's opinion about whether the relief granted also covered maritime employees working primarily on vessels on the high seas that are engaged in *coastwise* voyages. The district court cited the deposition testimony of a California Division of Labor Standards Enforcement official that suggested that Aubry intended to apply California overtime wage laws to non-inhabitant maritime employees. The court apparently concluded that the commissioner might possibly apply California law to employees who voyage from California to other states, 709 F. Supp. at 1255, and that the threat of enforcement of California wage laws against employers engaged in coastwise voyages was sufficient to present a justiciable controversy under Article III of the Constitution as to those employers. On the other hand, the overall thrust of the district court's analysis strongly suggests that the discussion was limited to employees, like those who brought claims in the underlying state administrative action, who work only on vessels

its decision did not affect the rights of non-FLSA exempt maritime employees working within California's territorial waters. 709 F. Supp. at 1523 n.7.[6] We conclude that, within these limits, the scope of the declaratory relief met the Constitution's case and controversy requirements. *See Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. at 298-305.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.,* 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied,* 110 S. Ct. 3217 (1990).

DISCUSSION

This appeal turns on one core issue: Does federal law preempt California from applying its overtime pay laws to

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off the California coast that do not engage in foreign, intercoastal, or coastwise voyages. *See* 709 F. Supp. 1519, 1523-25. This ambiguity may be due to the fact that the employees involved in this action work on coastwise *vessels, see* 46 C.F.R § 70.10-13 (1988) (defining "coastwise vessels" as vessels "normally navigating the waters . . . 20 nautical miles or less offshore"), but were *not* in fact engaged in coastwise *voyages, see* 709 F. Supp. at 1524. We resolve any arguable ambiguity over the scope of the relief granted by the district court by limiting the scope of our opinion to those employees described and discussed by the district court, i.e., maritime employees who work off the California coast on vessels that do not engage in foreign, intercoastal, or coastwise voyages. We do not address the question whether Aubrey is preempted by federal law from applying California's overtime pay laws to maritime employees employed primarily on the high seas on *coastwise* vessels engaged in *coastwise* voyages.

[6]PMSA agrees in its brief to this court that Aubry "is currently free to apply California's overtime laws to non-FLSA-exempt, general maritime law seamen [i.e., maritime employees] with respect to work that takes place primarily within California's territorial waters."

seamen working on territorial waters and on the high seas off the California coast and to maritime employees working primarily on the high seas off the California coast, when the vessels on which the employees work do not engage in foreign, intercoastal, or coastwise voyages? For the reasons stated below, we hold that it does not.

PMSA and Tidewater contend that California's overtime pay laws are preempted by two federal statutes—the Shipping Act and the FLSA—and by general admiralty law. To decide whether a federal statute preempts state law, "our sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 280 (1987). Federal law preempts state law if (1) Congress expressly so states, (2) Congress enacts comprehensive laws that leave no room for additional state regulation, or (3) state law actually conflicts with federal law. *Id.* at 280-81: *see Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984); *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483, 486 (9th Cir. 1984), *cert. denied,* 471 U.S. 1140 (1985).

States, however, possess broad authority under their police powers to regulate the employment relationship to protect resident workers. *De Canas v. Bica,* 424,U.S. 351, 356 (1976). Thus, in addressing the preemption question before us, " 'we start with the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless that was the *clear and manifest* purpose of Congress.' " *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d at 488 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)) (emphasis added in *Hammond*).

I. The Shipping Act

PMSA and Tidewater assert that Congress preempted Aubry's actions in this case by extensively regulating maritime employment through the Shipping Act. The district court rejected this contention and held that Aubry's enforcement of California's overtime provisions to maritime employees on the high seas and seamen is not preempted by statutory maritime law. *See* 709 F. Supp. 1523-24. According to the district court, "[m]aritime statutes simply do not purport to govern the overtime wages of employees such as those in this action." 709 F. Supp. at 1524. We agree with the district court's conclusion that the Shipping Act does not preempt California overtime pay laws with respect to the seamen and maritime employees at issue in this case.

The Shipping Act does govern some maritime employees' wages, hours, and working conditions. *See* 46 U.S.C. §§ 10301-10908. As the district court noted, however, these provisions *do not apply* to the employees involved in this appeal, because they cover only vessels engaged in foreign, intercoastal, or coastwise voyages. *Id.*[7] Further, while all maritime employees are covered by certain provisions relating to "protection and relief," e.g., accommodations on ship, 46 U.S.C. § 11101, medical care for maritime workers, 46 U.S.C. § 11102, and limitations on attachment of wages, 46 U.S.C. § 11109, these provisions in no way regulate overtime pay.

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[7]The district court found: "The crewmembers whose claims precipitated this action were not on 'voyages' that fall under any of these three categories. Their vessels either stayed on the high seas surrounding the oil rigs or 'voyaged' between one port and the oil rigs." 709 F. Supp. at 1519.

PMSA and Tidewater both argue, however, that to apply California's overtime pay laws to maritime employees and seamen conflicts with 46 U.S.C. § 8104, which sets "manning requirements" — including maximum hours and minimum "watches" — for maritime workers.[8] Under 46 U.S.C. § 8104(b),

> [o]n an oceangoing or coastwise vessel of not more than 100 gross tons (except a fishing, fish processing, or fish tender vessel), a licensed individual may not be required to work more than 9 of 24 hours when in port, including the date of arrival, or more than 12 of 24 hours at sea, except in an emergency when life or property are [sic] endangered.

Maritime employers who violate this section are subject to civil penalties. 46 U.S.C. § 8104(i), (j). PMSA and Tidewater contend that California's overtime pay laws, which require overtime pay for hours worked in excess of eight hours per day, conflict with this federal statutory provision by creating a maximum below the 12 hour maximum established in section 8104(b).

We reject this contention. We addressed a similar argument in *Agsalud v. Pony Express Courier Corp. of Am.*, 833 F.2d 809 (9th Cir. 1987) *("Agsalud")*. In that case, a motor carrier contended that the state of Hawaii's overtime pay law was preempted by the federal Motor Carrier Act, 49 U.S.C. §§ 3101-3104. Regulations issued under the Motor Carrier Act generally provided for a maximum work week of 60 hours, while the Hawaii statute required overtime pay for work in excess of 40 hours per week. *Id.* at 810. We held that, absent a showing that the

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[8]Section 8104 is not limited to vessels engaged in foreign, intercoastal, or coastwise voyages, and, therefore, applies to the employees at issue in this case. *See* 46 U.S.C. § 8101-8105.

state law had the effect of establishing a firm maximum on hours worked different from the maximum set by federal law, Hawaii's overtime pay provisions did not conflict with federal law, and were not preempted. *Id.* We explained that "[o]ne need not be an economist to realize that some employers may continue to provide more than 40 hours of work even though an overtime premium is required, because paying the premium may be cheaper than the alternatives of not providing service to customers or hiring new help." *Id.*

Our reasoning in *Agsalud* applies with equal force here. PMSA and Tidewater have made no showing that the effect of Aubry's enforcement action will be to set a firm maximum different from that set in 46 U.S.C. § 8104. The argument that California's overtime pay law conflicts with section 8104 of the Shipping Act and is preempted, therefore, fails.

While the Shipping Act does comprehensively regulate maritime activities, it does not regulate overtime pay for the workers involved in this case. The Shipping Act does not preempt California from applying its overtime pay laws to the seamen and maritime employees involved in this action.

II. The FLSA

After rejecting PMSA and Tidewaters' Shipping Act preemption argument, the district court held that the FLSA preempted California overtime pay laws with respect to the employees at issue in this case. The district court concluded that, with respect to FLSA-exempt seamen, Congress' decision to exclude seamen from the federal act's overtime provisions evinced its intent to preempt all state overtime laws as to those employees, whether on territorial waters or on the high seas. 709

F.Supp. at 1525. The district court further held that, with respect to general maritime employees, California overtime provisions conflict with the FLSA, and that the FLSA's savings clause[9] cannot save state laws regulating workers on vessels "primarily situated on the high seas." 709 F.Supp. at 1524-25.

A. Exemption of Seamen from the FLSA

We address first the question whether, by exempting seamen from federal overtime coverage under 29 U.S.C. 213(b)(6), Congress preempted California's overtime laws with respect to seamen. We hold that section 213(b)(6) does not preempt California from applying the state's overtime pay laws to FLSA-exempt seamen working off the California coast.

The Seamen involved in this case work both on California's territorial waters and on the high seas.[10] The district court held that the FLSA preempts California's overtime provisions as applied to seamen on the high seas *and* on territorial waters, reasoning that, because seamen are exempt from federal overtime provisions under the FLSA, 29 U.S.C. § 213(b)(6), "Congress has spoken directly on the issue of overtime pay for seamen." 709 F.Supp. at 1525. This holding raises an important issue regarding the effect of a specific exemption of a category of maritime workers — seamen — from coverage under federal law, i.e., should the specific legislative provision

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[9]Under 29 U.S.C. § 218(a), no provision of the FLSA preempts another federal, state, or municipal law from "establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum workweek lower than the maximum workweek established under [the FLSA]."

[10]As noted above, "seamen" as used by the district court is defined more narrowly than "maritime employee."

exempting seamen from the FLSA's overtime compensation standards be read broadly to indicate congressional intent to preclude states from regulating the subject of seamen's overtime compensation?

No Ninth Circuit case squarely addresses this issue. We turn, then, to an examination of the language and legislative history of the FLSA.

When Congress originally enacted the FLSA of 1938, it exempted seamen from coverage under the act's minimum wage and overtime provisions. In 1961, Congress brought seamen employed on American vessels under the FLSA's minimum wage provisions, but maintained their exemption from coverage under the act's overtime provisions. At no time has Congress expressly prohibited states from applying their overtime laws to seamen. Further, PMSA and Tidewater point to nothing in the legislative history of § 213(b)(6) — either in the 1938 act or in the 1961 amendments to the FLSA — that suggests that Congress intended to preclude application of state overtime provisions to seamen. Our review of the legislative history has revealed no such congressional intent.[11]

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[11] *See Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 544-549, 1216-17 (1937); 82 Cong. Rec. 1784 (1937); 82 Cong. Rec. 7875 (1937). *See also Hearings on Various Bills Regarding Minimum Wage Legislation Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 86th Cong., 2d Sess. 885-92, 895-96, 920-48, 1522-23 (1960); *Hearings on H.R. 3935 and Various Bills Regarding Minimum Wage Legislation Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 87th Cong., 1st Sess. 63-64, 83, 379-80, 597-99 (1961); *Hearings on S. 256, S. 879, S. 895 and Bills Amending the Fair Labor Standards Act Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 87th Cong., 1st Sess. 15, 41, 376-93, 558,

The legislative history of the FLSA does show that Congress considered the special circumstances of maritime and other types of labor when it exempted seamen and other employees from the FLSA's overtime and minimum wage provisions. Federal Amicus argues, however, and we agree, that in exempting seamen from coverage under the 1938 act's overtime and minimum wage provisions, Congress intended to prevent overlapping regulation of wage and hour conditions of seamen by different federal agencies. *See Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 546-49, 1216-17 (1937); 82 Cong. Rec. 1784-85, 7875 (1937); *see also* 29 C.F.R. § 783.29 (1989) (discussing legislative history of exemption).[12] Further, the extensive legislative history of the 1961 amendments to the FLSA makes clear Congress' determination that federal minimum wage levels for seamen were necessary, but discloses nothing indicating that, by leaving the exemption of

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682-83 (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. 13-14, 31 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 103 (1961).

[12]Under the FLSA of 1938 as proposed, all wage and hour claims were to be handled by a new Labor Standards Board. At the time Congress was considering the proposed legislation, however, maritime employees' wage and hour claims were handled by the Maritime Commission under the Merchant Marine Act of 1936. *See Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 1216-17. At least one witness testifying on behalf of organized labor supported the exemption of seamen from the FLSA's overtime and minimum wage provisions on the ground that overlapping federal agency jurisdiction over seamen's wage and hour claims could threaten gains already achieved by organized maritime labor before the Maritime Commission. *See id.* at 544-49 (testimony of Ralph Emerson, Legislative Representative, National Maritime Union of America).

seamen from the FLSA's overtime provisions in place, Congress intended to preclude states from applying overtime pay provisions to FLSA-exempt seamen.[13]

Related case authority supports the conclusion that, absent clear congressional intent to the contrary, the exemption of seamen from the FLSA's overtime provisions does not, per se, preempt California from applying its overtime pay laws to seamen. In *Agsalud,* for example, we held that the exemption of truck drivers engaged in interstate transportation of goods from the FLSA's overtime provisions did not preempt state overtime laws as to those workers. 833 F.2d at 810. In reaching that conclusion, we expressly adopted the reasoning of *Pettis Moving Co., Inc. v. Roberts,* 784 F.2d 439 (2d Cir. 1986) ("*Pettis Moving Co.*"), and *Williams v. W.M.A. Transit Co.,* 472 F.2d 1258 (D.C. Cir. 1972) ("*Williams*"), two cases involving the question whether exemption of certain employees from the FLSA's wage provisions, per se, preempts state law with respect to those employees. *See Agsalud,* 833 F.2d at 810.

In *Pettis Moving Co.,* a New York motor carrier argued that, because Congress exempted employees of interstate motor carriers from coverage under the FLSA's overtime

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[13] *See Hearings on Various Bills Regarding Minimum Wage Legislation Before the Subcomm. on Labor Standards of the House Comm. of Education and Labor,* 86th Cong., 2d Sess. 885-92, 895-96, 920-48, 1522-23 (1960); *Hearings on H.R. 3935 and Various Bills Regarding Minimum Wage Legislation Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 87th Cong., 1st Sess. 63-64, 83, 379-80, 597-99 (1961); *Hearings on S. 256, S. 879, S. 895 and Bills Amending the Fair Labor Standards Act Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 87th Cong., 1st Sess. 15, 41, 376-93, 558, 682-83 (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. 13-14, 31 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 103 (1961).

provisions, New York could not apply its overtime pay laws to those employees. The Second Circuit first emphasized that "[t]raditional powers of the states . . . are not superseded by federal acts unless that was the clear and manifest purpose of Congress." 784 F.2d at 441 (*citing Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978)). The court then noted that the FLSA's savings clause "explicitly permits states to set more stringent overtime provisions than the FLSA," and held that "Congress did not prevent the states from regulating overtime wages paid to workers exempt from the FLSA." *Id.* at 441.

In *Williams,* the D.C. Circuit addressed the question whether the District of Columbia's minimum wage laws could be applied to bus drivers who were employed by interstate motor carriers and, therefore, were exempted from the FLSA's minimum wage provisions. That court also relied on the FLSA's savings clause in finding no preemption: "This section expressly contemplates that workers covered by state law as well as FLSA shall have any additional benefits provided by the state law — higher minimum wages; or lower maximum workweek. By necessary implication it permits state laws to operate even as to workers exempt from FLSA." 472 F.2d 1261.

Finally, at least one district court in our circuit has held that Congress' exemption of certain maritime employees from coverage under a maritime wage statute did not preempt a state from regulating those employees' wages. In *Sewell v. M/V Point Barrow,* 556 F. Supp. 168 (D. Alaska 1983) (Fitzgerald, D.J.), workers employed on vessels engaged in offshore test drilling off the Alaska coast filed an action to recover unpaid wages and for penalties under state and federal law. After holding the employees were exempted from coverage under the fed-

eral statute,[14] the court reached the employer's contention that "the exemption of coastwise vessels from the [federal] penalty provisions . . . demonstrate[d] a congressional intent that seamen employed on coastwise vessels not receive delayed wage payment penalties." *Id.* at 169. The court rejected this argument based on its conclusion that Congress did not intend, by exempting coastwise seamen, to preempt state wage penalty laws, but rather intended that coastwise seamen would be treated like other workers under state law. *Id.* at 170.

Based on these authorities and on general principles of federal preemption, we hold that, in light of the plain language of the FLSA's savings clause and in the absence of a clear indication from Congress to the contrary, § 213(b)(6) does not preclude enforcement of California's overtime provisions to protect the California-resident seamen in this case. The district court erred by holding that section 213(b)(6) preempts California overtime pay laws with respect to FLSA-exempt seamen on the high seas and within the territorial zone off the California coast.

B. Non-FLSA-Exempt Maritime Employees on the High Seas

We next address the question whether the FLSA preempts California from applying the state's overtime

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[14]The employees sought penalties for failure to pay wages under 46 U.S.C. § 596, which provides that an employer who fails to pay wages shall pay a penalty equal to two days' wages for each unpaid day. Under 46 U.S.C. § 544, however, employees on "coastwise" voyages are exempted from 46 U.S.C. § 596. The district court in *Sewell v. M/V Point Barrow* held that the employees who brought the action were employed on vessels engaged in coastwise trade and were exempt from coverage under 46 U.S.C. § 596.

pay laws to maritime workers, not exempt from the FLSA, who work on vessels situated primarily on the high seas off the California coast.

The parties agree that California's overtime pay laws and the FLSA overtime provisions that cover non-exempt maritime employees conflict, and that California's provisions are more generous than the FLSA.[15] The key issue is whether the FLSA's savings clause allows California to apply its more generous overtime laws to the maritime workers involved in this case. The savings clause provides in relevant part:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage estab-

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[15]According to the district court, "the California overtime provisions and the FLSA provisions produce widely differing results." 709 F. Supp. at 1524. The most important differences between California's overtime pay provisions and the FLSA are as follows: under California law, overtime at one and one-half times an employee's regular rate must be paid after eight hours work per day, 8 Cal. Code Regs. § 11040.3(A)(1), while under the FLSA, overtime must be paid after 40 hours work per week, 29 U.S.C. § 207(a); 29 C.F.R. § 778.101; under California law, all hours in excess of 12 per day must be paid at double time, 8 Cal. Code Regs. § 11040.3(A)(2), while the FLSA contains no such provision; under California law, "hours worked" is defined broadly, to include "the time during which an employee is subject to the control of an employer," 8 Cal. Code Regs. § 11040.2(H), while under the FLSA "hours worked" as applied to seamen includes only hours when the employee is "actually on duty," 29 U.S.C. § 206(a)(4); and under California law, payments to employees on a "fluctuating workweek" basis — i.e., by fixed salary that reflects average hours worked — are not permitted, *Skyline Homes, Inc. v. Dept. of Indus. Relations*, 165 Cal. App. 3d 239, 211 Cal. Rptr. 792 (1985), while under the FLSA, such payments are allowed in certain limited circumstances, 29 C.F.R. § 778.114.

> lished under this chapter or a maximum workweek lower than the maximum workweek established under this chapter . . . .

29 U.S.C. § 218(a).

Aubry and federal amicus contend that the savings clause signals Congress' intent that the wage and hour standards set in the FLSA are a floor, and that states are free to establish wage and hour levels higher or more generous than the FLSA standards. They further argue that Congress, in enacting the FLSA, evinced no intent to preclude maritime workers' benefiting from the savings clause. The district court rejected this argument, based on its conclusion that principles of federal admiralty law require that the FLSA's savings clause be construed restrictively in this case. The district court reasoned:

> [T]he FLSA's savings clause cannot properly be construed to save state laws that seek to regulate the employment of maritime employees whose work situs is a vessel normally situated on the high seas. This is so because Congress may not constitutionally delegate its maritime jurisdiction to the states. Such a delegation would destroy the harmony and uniformity of admiralty law established by the Constitution. Thus, under compulsion of the Constitution, the savings clause must be interpreted as not applying to maritime employees employed primarily on the high seas.

709 F. Supp. at 1524-25 (citations omitted). According to the district court, while this restrictive interpretation of the savings clause "lacks direct precedential support," common sense demanded it. *Id.* at 1525.

For the reasons stated below, we hold that the district court erred. Neither the FLSA, by its terms, nor general

admiralty law preempts California from applying the state's overtime pay laws to non-exempt maritime workers at issue in this case.

1. *Jensen* and its Progeny

The district court based its restrictive reading of section 218 on a long line of cases, beginning early in this century, in which courts limited states' power to regulate maritime activities on the ground that the United States Constitution requires uniformity in admiralty law. Article III, Section 2 of the Constitution provides in part that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." The Supreme Court has held that this provision, by implication, grants Congress the power to revise and supplement the maritime law, and grants federal courts power to develop the general maritime law. *See Romero v. International Terminal Operating Co.,* 358 U.S. 354, 360-61 (1959).

In *Southern Pac. Co. v. Jensen,* 244 U.S. 205, 216 (1917) ("*Jensen*"), the Supreme Court restricted states' authority in maritime matters based on this constitutional grant of authority to the federal government. Under the so-called *Jensen* doctrine, no state legislation concerning navigation is valid

> if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

This

> limitation, at the least, is essential to the effective operation of the fundamental purposes for which [the maritime] law was incorporated into our national laws by the Constitution itself.

Jensen, 244 U.S. at 216. This rule was extended in *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920) ("*Knickerbocker Ice*"), where the Supreme Court struck down an act of Congress that directly granted states authority to apply state workers compensation laws to maritime employers. The Court stated that the delegation was "beyond the power of Congress." *Id.* at 164.

Here, the district court reasoned that the constitutional considerations underlying *Jensen* and *Knickerbocker Ice* foreclosed straightforward application of the FLSA's savings clause *to a specific category of workers — maritime employees employed primarily on the high seas.* According to the district court, allowing the FLSA's savings clause to permit California's actions in this case would effect a *delegation* of maritime authority, invalid under *Knickerbocker Ice,* and would otherwise be invalid as destructive of harmony in federal admiralty law.

We disagree with the district court's holding that section 218, if construed to allow Aubry's actions with respect to maritime employees on the high seas, would in effect be a *delegation* of congressional maritime powers to the state. California's actions in this case represent an exercise of traditional police powers firmly in place *before* Congress enacted the FLSA. *See West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace

and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."). Thus Congress did not "delegate" authority to the states through section 218, but simply made clear its intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards. We cannot read section 218 as a delegation, and, therefore, conclude that *Knickerbocker Ice* does not control this case.

This conclusion, however, does not settle the issue before us. General principles of admiralty law still limit states' authority to regulate maritime activities. We must determine whether, under *Jensen* and its progeny, those principles require a restrictive reading of section 218 in this case.

"The *Jensen* doctrine, though easily stated, is not easily applied." 1 Friedell, *Benedict on Admiralty,* § 112, at 7-36 (7th ed. 1987).[16] The Supreme Court long ago rejected a rigid per se rule that all state regulation of maritime activities is constitutionally invalid. In *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 338 (1973), for example, a unanimous court explained that *Jensen* and *Knickerbocker* have been "limited by subsequent holdings of [the] Court." In *Romero v. Int'l Terminal Operating Co.,* 358 U.S. at 373, the Court explained that *Jensen's* limitation on state authority "still leaves the States a wide scope." *See also Just v. Chambers,* 312 U.S. 383, 388

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[16] *See generally* 1 Friedell, *Benedict on Admiralty,* §§ 11-114, at 7-31 to 7-72 (reviewing doctrine limiting power of states to independently regulate maritime matters); Gilmore and Black, *The Law of Admiralty* 49-50 (same); D. Robertson, *Admiralty and Federalism* 200 (1970) (same); Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* S. Ct. Rev. 158 (1960) (same).

(1941) (state may modify or supplement maritime law); *Maryland Casualty Co. v. Cushing,* 347 U.S. 409, 429 (Black, J., dissenting) (except in limited circumstances, "states are free to make laws relating to maritime affairs").

Yet the Court has demonstrated the continuing force of *Jensen.* In *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986) ("*Tallentire*"), the Court held that the federal admiralty law — specifically, the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 — preempted Louisiana's wrongful death statute, notwithstanding a DOHSA savings clause that provided that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected" by the DOHSA. The Court cited *Jensen* for the proposition that " '[n]o [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress.' " *Id.* at 298 (quoting *Jensen,* 244 U.S. at 216); *see also Askew v. American Waterways Operators, Inc.,* 411 U.S. at 344 (acknowledging that *Jensen* "has vitality left").

Our review of relevant case authority leads us to conclude that the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system.[17] The

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[17] *See* 1 Friedell, *Benedict on Admiralty* § 112, at 7-36; Gilmore and Black, *The Law of Admiralty* 50 (2d ed. 1975); Tribe, *American Constitutional Law* 304 (2d ed. 1988). There is ample support for this rule in our circuit. *See Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483, 496 (9th Cir. 1984), *cert denied,* 471 U.S. 1140 (1985) (state law should be preempted only to the extent necessary to protect the achievement of the aims of the federal act in question); *Wasyl, Inc. v. First Boston Corp., Inc.,* 813 F.2d 1579, 1582 (9th Cir. 1987) (same);

questions, then, are (1) whether applying California's overtime provisions to maritime employees on the high seas contravenes an act of Congress, and (2) whether applying the provisions would unduly disrupt uniformity in maritime law.

2. Does California's Overtime Pay Law Contravene an Act of Congress?

The district court found, and we agree, that the maritime employees "fall in the interstices between express federal maritime statutes." 709 F. Supp. at 1525. Maritime statutes do not apply to maritime employees, like these, who are not on vessels making foreign, intercoastal, or coastwise voyages. In addition, Congress has specifically allowed states to enforce overtime laws more generous than the FLSA, 29 U.S.C. § 218(a), and we find no indication that Congress intended that maritime employees not benefit from more generous state wage and hour laws. California's attempt to supplement federal law in this case does not present an irreconcilable conflict with the statutory maritime law or with the FLSA; it does not "contravene the essential purpose expressed by an act of Congress." *Cf. Tallentire,* 477 U.S. at 298; *Jensen,* 244 U.S. at 216.

Bergen v. F/V St. Patrick, 816 F.2d 1345, 1348-49 (9th Cir. 1987) (" 'there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted' ") (quoting *Mobile Oil Corp. v. Higginbotham,* 436 U.S. 618, 624-25 (1978)); *Sewel v. M/V Point Barrow,* 556 F. Supp. 168, 169 (D. Alaska 1983) ("admiralty courts may recognize and enforce rights and obligations created by state law"). Other circuits' cases also support the rule. *See Carey v. Bahama Cruise Lines,* 864 F.2d 201, 207 (1st Cir. 1988); *Exxon Corp. v. Chick Kam Choo,* 817 F.2d 307, 317-18 (5th Cir. 1987), *rev'd on other grounds,* ___ U.S. ___, 108 S. Ct. 1684 (1988); *Steelmet, Inc. v. Caribe Towing Corp.,* 779 F.2d 1485, 1488 (11th Cir. 1986).

This case, therefore, differs significantly from two recent Supreme Court decisions the district court relied on in narrowly construing section 218 of the FLSA: *Oil, Chem., & Atomic Workers, Int'l Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407 (1976) ("*Mobil Oil*"), and *Tallentire*. *Mobil Oil Corp.* and *Tallentire* both involved interpretation of savings clauses in federal statutes, and the Court construed the savings clauses narrowly in each case. *Mobil Oil* and *Tallentire*, however, do not require a restrictive interpretation of section 218 of the FLSA in this case.

The issue in *Mobil Oil* was whether Texas could apply its "right-to-work" laws to workers employed on oil tankers on the high seas off the Texas coast. Like the present case, *Mobil Oil* required interpretation of a savings clause — federal labor statutes expressly allow so-called union "agency shop" agreements,[18] 29 U.S.C. § 158(a)(3), but also allow states to prohibit such agreements through "right-to-work" laws, 29 U.S.C. § 164(b). The Court, as a matter of statutory interpretation, held that the savings clause at issue could not be read to allow Texas to apply its right-to-work laws to maritime employees who worked on the high seas outside of the state's territorial waters. In so holding, however, the Court relied on clear legislative history expressing congressional intent to restrict the savings clause's reach. Congress, the Court concluded, "viewed [the savings clause] as allowing a State to ban [agency shop] agreements calling for work to be performed *within the State*." 426 U.S. at 418 (emphasis

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[18] "An 'agency shop' agreement generally provides that while employees do not have to join the union, they are required . . . to pay the union a sum equal to the union initiation fee and are obligated as well to make periodic payments to the union equal to the union dues." *Mobil Oil*, 426 U.S. at 409 n.1.

added). Further, the Court noted that the purpose and effect of Texas right-to-work law directly conflicted with the federal statute. *Id.* at 417.

In *Tallentire,* the Court held that a DOHSA savings clause that allowed wrongful death actions in state courts for deaths on the high seas did not allow states to apply their *substantive* state wrongful death laws to deaths on the high seas, but instead only preserved state court *jurisdiction* to hear wrongful death actions under the DOHSA. 477 U.S. at 220-32. As in *Mobil Corp.,* the Court based its restrictive interpretation of the savings clause at issue on the language, purpose, and legislative history of the federal statute.[19] And again, the Court noted the clear conflict between the state law and federal statute: "No reasonable doubt could be entertained of the displacement of state remedies for deaths occurring on the high seas because the conflicting federal standard was not derived just from general federal maritime law; it was explicitly provided for by federal legislation directly on point." *Id.* at 228. Further, the Court noted that an express purpose of Congress in enacting the DOHSA was to achieve uniformity in wrongful death actions for deaths on the high seas. *Id.* at 230-31.

In contrast to the savings clauses at issue in *Mobil Oil* and *Tallentire,* we find no indication in the language or legislative history of the FLSA's savings clause that Congress intended that section 218 not allow states to apply more generous overtime pay laws to maritime work-

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[19]That history revealed strong expressions by bill supporters that federal law would apply exclusively to actions for deaths on the high seas. *See Tallentire,* 477 U.S. at 223-30. *See also* Gray, *Applicability of State Wrongful Death Statutes on the High Seas,* 18 J. Mar. L. & Com. 67, 81-88 (1987) (discussing *Tallentire* and legislative history of DOHSA savings clause).

ers working on the high seas. In addition, California's more protective overtime provisions are compatible with, rather than conflict with, the federal statute. Compatible state law may supplement federal admiralty law. *See Chevron U.S.A., Inc. v. Hammond*, 726 F.2d at 495-501 (finding no conflict between federal maritime statute and more stringent state maritime law provisions); *Sewell v. M/V Point Barrow*, 556 F. Supp. at 170-71 (same). Neither *Mobil Oil* nor *Tallentire* requires preemption in this case.[20]

3. Does California's Overtime Pay Law Unduly Disrupt Uniformity in Admiralty Law?

The district court based its holding in part on the "common sense" notion that "the uniformity of federal admiralty law would be destroyed if the states were permitted to 'add on' to the federal law enacted by Congress." 709 F. Supp. at 1525. Likewise, PMSA and Tidewater argue on appeal that allowing states to enforce their overtime provisions against maritime employers would produce a "crazy-quilt pattern of regulation."

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[20]Cases in our circuit relied on by PMSA and Tidewater are also distinguishable on the ground that the state laws invalidated as preempted by federal law in those cases were in direct conflict with federal admiralty law. *See Evich v. Morris*, 819 F.2d 256, 257-58 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987) (state survival action preempted by conflicting federal maritime survival law); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348-49 (9th Cir. 1987) (state punitive damages remedy in wrongful death action preempted by DOHSA, which disallows punitive damages remedy); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) (state wrongful death action preempted by conflicting federal maritime wrongful death law); *Daughtry v. Diamond M Co.*, 693 F. Supp. 856, 861-63 (C.D. Cal. 1988) (state procedural rules on effect of settlement on joint tortfeasors' duty to contribute preempted by conflicting federal procedural rules).

The Constitution tolerates some disharmony in admiralty law. As discussed above, states may supplement admiralty law, and states' supplementation of admiralty law necessarily creates some discord in that law.[21] Nevertheless, *Mobil Oil, Tallentire*, and *Jensen* and its progeny make clear that the interest in uniformity in admiralty law must be considered in determining the validity of state regulation of maritime activities. Our circuit has also acknowledged the importance of uniformity in admiralty law. *See, e.g., Evich v. Morris*, 819 F.2d 256, 257-58 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). We are left, therefore, with the difficult question whether applying California's overtime provisions to maritime employees who work on vessels on the high seas that do not engage in foreign, intercoastal, or coastwise voyages *unduly disrupts* harmony in the federal admiralty system, so as to render unconstitutional Aubry's actions. We hold that it does not.

Whether Aubry's application of California's overtime provisions unduly disrupts federal maritime harmony in violation of the Constitution depends on the balance of federal and state interests involved in application of the overtime provisions. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961); *East River S. S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 n.2 (1986); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317 (5th Cir. 1987), *rev'd on other grounds*, 108 S. Ct. 1684 (1988);

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[21] "All state laws, if given effect in admiralty cases, interfere to a degree with the uniformity of admiralty law." Friedell, 1 *Benedict on Admiralty* § 12, at 7-36; *see also Romero v. International Terminal Operating Co.*, 358 U.S. at 374 ("Maritime law is not a monistic system.").

Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986).

We conclude that the balance tips in favor of California in this case. Under California law, the Labor Commission is charged with enforcing state wage provisions to ensure the health, safety, and welfare of resident employees. Cal. Labor Code § 1173. Here Aubry has attempted to provide additional protection to employees involved in work of critical importance to the state — containment and clean-up of marine oil spills. In addition, the record indicates that the maritime employees involved in this case are California residents, were interviewed and hired in California, and pay California taxes. Their contacts with the state are quite close: the vessels involved in this case do not make coastwise, intercoastal, or foreign voyages; *Mr. Clean II* is moored in a California harbor 90 percent of the time and works exclusively on oil rigs off the California coast; and *Mr. Clean III* is stationed exclusively off the California coast and visits only California ports.

PMSA and Tidewater contend, however, that California's interest in enforcing its overtime pay laws in this case are undercut by Aubry's failure to comply with state administrative and procedural requirements regarding wage and hour rulemaking and law enforcement. This argument is misplaced. We emphasize that we are *not* deciding here whether Aubry's actions are valid *as a matter of California administrative and labor law.* Our task is to determine only whether, in this case, federal law preempts California's overtime pay provisions. The state's interests in applying its overtime provisions here are plain. PMSA and Tidewaters' challenges to Aubry's action on state law grounds must be directed to the state's agencies and courts, and we assume here that the labor

commissioner's actions comply fully with state law and procedures.[22]

In contrast to the [sic] California's strong interests, Federal interests in precluding enforcement of California's overtime provisions in this case are relatively weak. There is no indication that Congress, in enacting the FLSA's savings clause, intended to preempt states from according more generous protection to maritime employees on the high seas off a state's coastal waters. Further, the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.

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[22]In some circumstances, comity requires that federal courts abstain from considering actions for declaratory and injunctive relief against state proceedings. *See Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353 (9th Cir. 1986); *Younger v. Harris*, 401 U.S. 37 (1971). According to the parties, however, no state court is currently considering the issues raised in this appeal. " '[T]he salient fact' in determining whether *Younger* abstention is appropriate 'is whether federal-court interference would unduly interfere with the legitimate activities of the state.' " *Sable Communications of Cal. v. Pacific Tel. & Tel.*, 890 F.2d 190 (9th Cir. 1989) (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433 n.12 (1982)). Here, we address only the purely federal question of whether federal statutes and general admiralty law preempt California's overtime pay laws. We do not address any state law issues raised by Aubry's actions. Because there is no ongoing state adjudication of the claims here at issue, and because the state law challenges to Aubry's actions necessarily involve issues distinct from those federal issues now before us, concerns of comity underlying the *Younger* abstention doctrine are not present here. *See Id.; Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d at 1358. The district court was not required to abstain.

Most important, because the maritime employees involved in this action are California residents who work on vessels that operate exclusively off the California coast, application of the state's overtime law will not disrupt international or interstate commerce. Uniformity in maritime law is required "only where the essential features of an exclusive federal jurisdiction are involved." 1 Friedell, *Benedict on Admiralty* § 111, at 7-32; *see Just v. Chambers*, 312 U.S. at 388. The minimal impact that Aubry's actions would have on international and interstate maritime commerce leads us to conclude that the "essential features" of exclusive federal jurisdiction are not unduly burdened in this case.[23]

We have focused in this section on the question whether, under general admiralty principles, California is preempted from applying the state's overtime pay laws to non-exempt maritime employees who work on vessels situated primarily on the high seas that do not engage in foreign, intercoastal, or coastwise voyages. But our analysis applies as well to FLSA-exempt seamen who work on such vessels. As we held above, allowing California to apply its overtime pay laws to seamen does not conflict with the FLSA; exemption from the FLSA's overtime provisions does not, per se, preempt state overtime laws. Also, the balance between state and federal interests is the same with respect to the seamen at issue in this case as it is with respect to nonexempt maritime workers. The

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[23]This further distinguishes the present case from *Mobil Oil*, in which the Court noted the practical difficulties of allowing application of the state law in that case. *See* 426 U.S. at 418-19. In *Mobil Oil*, of the workers to which Texas sought to apply its laws, over half were residents of other states; over one-third listed New York, rather than Texas, as their port; and all were on vessels that voyaged regularly from Texas to New York or Rhode Island and back. 426 U.S. at 411. The practical problems present in *Mobil* are not present in this case.

Tidewater employee involved in the underlying action is a California resident; he works, like other California-based Tidewater employees, exclusively in California ports and on the high seas off the California coast. Thus, as with the maritime workers, we hold that allowing Aubry to apply California's overtime pay laws to the seamen involved in this suit does not unduly disrupt federal admiralty law, and, for that reason, is not constitutionally invalid.

Our conclusion that Aubry may constitutionally apply California's overtime provisions to maritime employees and seamen who work on the high seas off the California coast on vessels that do not engage in foreign, intercoastal, or coastwise voyages is supported by two recent decisions in this circuit. In *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483, we upheld an Alaska statute governing the discharge of ballast by oil tankers in Alaska's territorial waters where federal maritime law — the Port and Tanker Safety Act of 1978, 46 U.S.C. § 391 — also regulated coastal ballast discharge. We recognized in *Hammond* Alaska's strong interest in preventing oil pollution off its coast, noting that "[t]he subject matter of environmental regulation . . . has long been regarded by the [Supreme] Court as particularly suited to local regulation." *Id.* at 488. We concluded that state and federal regulation of the oil tankers were compatible, and that "there is no . . . dominant national interest in uniformity in the area of coastal environmental regulation." *Id.* at 492.[24] California has an equally strong interest in protect-

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[24]We did note in *Hammond* that the interest in uniformity in environmental regulation is greater where regulations cover activities on the high seas. 726 F.2d at 492 n.2. Our concern there, however, was clearly with regulation of *international* oil transport and *international* environmental protection efforts. *Id.* Here, as discussed above, the federal interest in uniformity is not as great, because the employees

ing maritime employees that reside in the state and work to protect California's coastal environment. *Hammond* thus lends support to Aubry's actions on the facts of the present case.

Also, in *Sewell v. M/V Point Barrow*, 566 F. Supp. 168, the Alaska District Court applied the state's wage laws to certain maritime employees working off the Alaska coast. The statute involved provided penalties, in the form of extra wage payments, to state workers not timely paid by maritime employers. *Id.* at 169-70. The district court held that, even though federal law did not provide such penalties for the employees in the case, enforcement of the Alaska statute was "fully compatible with federal maritime law," and no "feature of federal maritime law . . . would be impaired or frustrated by application of [the statute]." *Id.* at 170. *Sewell* thus supports the conclusion that California may constitutionally apply its more generous overtime laws to protect California-resident workers employed on the high seas off California's coast under the circumstances of this case.

The district court erred by holding that, under principles of federal admiralty law, the FLSA's savings clause cannot allow Aubry to apply California overtime laws that afford greater protection than the FLSA to California-resident maritime employees working primarily on the high seas off the California coast on vessels that do not engage in foreign, intercoastal, or coastwise voyages, whether or not the employees are exempted from the FLSA's overtime provisions.

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involved in this case are not engaged in foreign, intercoastal, or coastwise voyages.

CONCLUSION

Neither the Shipping Act nor the FLSA precludes Aubry's actions in this case, and, under the principles underlying *Jensen* and its progeny, applying California's overtime pay laws to these workers is not constitutionally invalid. Here, California's interest in protecting California-resident workers is great, the employees involved in the action work exclusively in waters off the California coast on vessels not engaged in foreign, intercoastal, or coastwise voyages, and Congress has shown no intent to preclude more generous state regulation of maritime workers. Aubry is not preempted from applying California's overtime provisions to the seamen and maritime employees involved in this suit.

The district court's judgment is REVERSED.

COPPLE, Senior District Judge, dissenting:

Judge Pregerson's majority decision explains in extensive detail the factual and procedural background of this appeal. Those facts will therefore only be highlighted. Twelve maritime employees filed complaints with the California Labor Commission seeking recovery of unpaid overtime wages due under the provisions of the California Industrial Welfare Commission Orders (8 Cal. Code of Regulations § 11345, *et seq.*). These maritime employees were hired by CLEAN SEAS, a company that owns and operates vessels which provide open ocean oil spill containment and recovery. The vessels are usually stationed over oil fields located in the Santa Barbara Channel approximately four to ten nautical miles off the California coast.

Some of the maritime employees are organized into crews that alternate work assignments in which they work seven days on the vessel followed by seven days rest on

shore. At the beginning and end of the seven day work assignments, the employees are transported via helicopter or vessel to and from the California coast.

In addition to those twelve employees, a deck engineer employed by TIDEWATER also filed a claim with the California Labor Commissioner for overtime against his employer. For that reason, TIDEWATER filed a complaint in intervention and was an intervenor on appeal. TIDEWATER provides offshore transportation in the Santa Barbara Channel between its pier or mooring buoy and oil rigs located between one and twelve miles offshore.

The Labor Commissioner of the State of California held a hearing pursuant to Cal. Lab. Code § 98 et seq. and made an award to each employee for unpaid overtime wages. In response to these awards, the employers along with various maritime associations filed a complaint for declaratory and injunctive relief in the District Court.

The District Court found that all of the employees in this action were engaged in activities on vessels which either stayed on the high seas surrounding the oil rigs or travelled between one port and the oil rigs located on the high seas. The District Court concluded that California could not apply its wage and hour provisions upon these employees who were primarily employed on the high seas because the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, preempted the application of such state laws to employees on the high seas. In so concluding, the District Court granted the employers' request for declaratory and injunctive brief, but limited the scope of the relief to, "(i) the FLSA-exempt seamen, whether working within the territorial zone or on the high seas, and (ii) maritime employees working primarily on vessels on the high seas that are not engaged in foreign or

intercoastal voyages." *Pacific Merchant Shipping Ass'n v. Aubry,* 709 F.Supp. 1516, 1526 (C.D. Cal. 1989). The District Court rejected a general federal admiralty law preemption argument, but held that the FLSA preempted California overtime pay laws with respect to the employees in this case.

A Court of Appeals may affirm a district court decision either on the same grounds, or on different grounds as those relied upon by the district court. *J.M. Martinac Shipbuilding v. Director, Office of Workers Compensation Programs,* 900 F.2d 180 (9th Cir. 1990). Therefore, it is appropriate to examine whether the District Court's decision is correct under either general federal admiralty law or under the FLSA.

I. Preemption Under Federal Admiralty Law

All sides agree that state laws which conflict with federal admiralty laws cannot be enforced by the state. *See, Southern Pacific Co. v. Jensen,* 244 U.S. 205, 217 (1917); *Daughtry v. Diamond M. Co.,* 693 F.Supp. 856, 861 (C.D.Cal. 1988). States may not apply their respective laws if the laws would "interfere with the proper harmony and uniformity" of existing admiralty law. *Southern Pacific Co.,* 244 U.S. at 216; *See also, Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920) (striking down an act of Congress which granted authority to the states to apply their workers compensation laws to maritime employees). However, state laws which do not conflict with federal admiralty law and which do not conflict with the essential characteristics of maritime uniformity may be incorporated into federal admiralty law and applied. 14 Wright & Miller, Federal Practice & Procedure: Jurisdiction 2d Section 3671, pp. 421-422; *Askew v. Ameri-*

can Waterways Operators, Inc., 411 U.S. 325, 341-42 (1973).

With respect to the present case, the district court reasoned that while a number of federal provisions do cover the overtime wages of seamen on a variety of voyages, no federal maritime law expressly addressed the overtime pay of the seamen and other maritime workers such as those involved in this case. The court then concluded that because the Maritime statutes did not purport to govern the overtime wages of employees such as those in this action, that maritime law did not preempt state overtime regulations. This is also the position taken by the employees and the United States.

This conclusion, however, does not consider all appropriate aspects of maritime law. The first aspect is that the employment relationship between the maritime employee and his employer is governed by maritime contract law. In *Union Fish Co. v. Erickson,* 248 U.S. 308 (1919) the Supreme Court held that California's statute of frauds was preempted by federal maritime law when raised in defense to a maritime contract claim. In reaching this decision, the Court stated that an employment contract between the master of a vessel and the vessel's owner is maritime in nature, and that any claim under the contract must be resolved pursuant to federal admiralty law.

The second aspect not considered is that absent an express contractual agreement to overtime pay, admiralty law has no requirement that a seaman receive such pay. *Sorensen v. City of New York,* 202 F.2d 857, 858-859 (2d Cir. 1953), *cert. denied,* 347 U.S. 951 (1954). The lack of an express overtime pay requirement for seamen under federal admiralty law does not necessarily mean that the federal government left the issue open to be decided by the states. To the contrary — cases reveal that courts,

regardless of state law, typically enforce employment contracts under admiralty law with respect to overtime pay. *See, e.g., The Youngstown,* 110 F.2d 968, 970 (5th Cir. 1940), *cert. denied,* 311 U.S. 690 (1940) (overtime performed and paid for in accordance with employment contract fully complies with the federal admiralty law); *C.M. Rousseau, Jr. v. Teledyne Movable Offshore, Inc.* 619 F. Supp 1513, 1518-1519 (D.La. 1985) (maritime employees held bound by employment agreement with respect to overtime claim).

As Justice Story stated in the historical case of *DeLovio v. Boit,* 2 Gall. 398, 7 F.Cas. 418 (C.C. Mass. 1815) (quoted in 14 C. Wright & A. Miller, Federal Practice & Procedure § 3675), admiralty jurisdiction of the federal courts "comprehends all maritime contracts. . .wheresoever they may be made or executed, or whatsoever may be the form of the stipulations." *Delovio,* 7 F.Cas. at 444. The employers point out that while the admiralty statutes do not specifically provide for overtime pay, admiralty law has developed through the federal courts to the point that the absence of overtime regulations means that maritime employers and employees may freely negotiate for the terms of the employment contracts apart from the strictures of state regulations.

This interpretation makes sense in light of the fact that the conditions under which maritime employees work, especially those working on the high seas, are substantially different from land-based employees. Land-based employees are able to return home every night after work whereas often in maritime situations employees are required to be transported to a work station on the high seas, remain at sea for days at a time and subsequently be transported back to land. This aspect of maritime life has

not changed for centuries and must have been understood at the inception of admiralty law.

> The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

The Lottawanna, 21 Wall. (88 U.S.) 558, 574, (1874). Justice Bradley went on to explain that in order to ascertain what the maritime law of this country is, if it is unclear from the laws and Constitution, "we must resort to the principles by which they have been governed." *Id.* at 576. Under this analysis, given that the maritime statutes do not provide for overtime compensation, one must resort to the principles by which maritime activities have been governed. Those principles are, as stated by the employers, that each maritime employee has been able to negotiate his own contract — to define and to include or not to include pay for overtime work. It is against this historical background that this case should be considered and it is through this historical background that one must conclude that state laws mandating overtime pay are preempted by federal admiralty law.

II. Preemption under the FLSA

The employers contend that state overtime regulations are not only preempted by federal admiralty law, but by the FLSA. The District Court found this argument "much more persuasive" than the preemption argument under federal admiralty law. 709 F.Supp. at 1524.

Section 207(a) of the FLSA provides overtime pay for employees who are engaged in "commerce or in the

production of goods of commerce." The district court concluded that because the employees are tied closely enough to commerce in that they are involved in the oil production industry, they are covered by this section of the FLSA. *Wirtz v. Intravaia,* 375 F.2d 62, 65 (9th Cir.), *cert. denied,* 389 U.S. 844 (1967); see also 29 U.S.C. Section 206(a)(4) (expressly applying minimum wage requirements to seamen).

The inclusion of seamen within the ambit of the FLSA is complicated by two other provisions of the Act. The first is 29 U.S.C. Section 213(b)(6) which exempts seamen from the FLSA's overtime compensation provisions. The District Court concluded that this specific exclusion of seamen from the overtime provisions further supported the argument that states were preempted from applying their overtime regulations to seamen such as the ones in this case. The district court stated:

> Congress has spoken directly on the issue of overtime pay for seamen. Therefore, California labor laws are preempted to the extent that they presume to regulate FLSA exempt seamen, both on the high seas and within the territorial zone. Further, given Congress' exemption of these seamen from even minimal federal overtime provisions, it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause.

709 F.Supp. at 1525. This conclusion seems not only logical, but the only reasonable inference that could be drawn from Congress' explicit exemption of seamen from the overtime provisions of the FLSA.

The employees and the United States argue that this conclusion is unreasonable in light of the savings provision of the Act and cases which discuss that savings provisions. The provision states:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter.

29 U.S.C. Section 218(a). The employees and the United States claim that this provision clearly shows congressional intent to allow the states to set more generous overtime rates, even for seamen, than those established by the FLSA. While this argument seems on the surface to have some merit, it is weak in light of Congress' specific exemption of seamen from the overtime provisions already found in the FLSA. It is reasonable to conclude that seamen are exempt from mandatory overtime provisions and that Congress did not intend to leave the matter to the states to set overtime provisions for maritime employees on the high seas. As was concluded by the district court, "in light of the obvious conflict between California's overtime compensation provision and the FLSA, the FLSA preempts California's provision." 709 F.Supp. at 1525.

III. Conclusion

The decision of the District Court to grant the declaratory and injunctive relief should be AFFIRMED. The decision is properly based either upon preemption under general admiralty law or preemption under the FLSA.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC MERCHANT SHIPPING ASSOCIATION,
AMERICAN INSTITUTE OF MERCHANT SHIPPING,
OFFSHORE MARINE SERVICE ASSOCIATION,
WESTERN OIL & GAS ASSOCIATION AND CLEAN SEAS,
Plaintiffs-Appellees,

vs.

LLOYD W. AUBRY, JR., LABOR COMMISSIONER,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA,
Defendant-Appellant,

and

TIDEWATER MARINE SERVICE, INC.
AND WESTERN BOAT OPERATORS, INC.
Intervenors-Appellees.

No. 89-55379

ORDER

FILED MAY 28, 1991

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: BROWNING and PREGERSON, Circuit Judges, and WILLIAM P. COPPLE, Senior District Judge

The panel as constituted above voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PACIFIC MERCHANT SHIPPING ASSOCIATION, etc., et al.,
Plaintiffs,
vs.
LLOYD W. AUBRY, JR., etc.,
Defendant,
TIDEWATER MARINE SERVICE, INC., et al.,
Intervenors.

NO. CV 88-0848-AWT

MEMORANDUM OPINION

FILED MARCH 1, 1989

I.

BACKGROUND

This case raises a novel issue of federal admiralty law: Whether California can apply its overtime pay provisions to seamen and to maritime employees employed on vessels situated primarily on the high seas.

Plaintiffs and intervenors seek declaratory and injunctive relief that California's labor laws are preempted by federal admiralty law and the United States Constitution insofar as they purport to regulate the wages, hours and working conditions of maritime employees whose work situs is a vessel normally situated on the high seas and seamen who work both on the high seas and within the territorial zone. Defendant is the California State Labor Commissioner (Labor Commissioner). He is in charge of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California (DLSE).

The matter is before the Court on the parties' cross-motions for summary judgment. Although there is some quibbling, essentially the parties agree upon the material facts and that only issues of law are involved.

A. *Terminology*

At issue in this case is whether "seaman" can take advantage of California's overtime compensation provisions. The term "seaman" is differently defined for different purposes. General maritime law defines "seamen" broadly to include individuals whose performance on board a vessel contributes to the functioning of the vessel, accomplishment of its mission or to the operation or welfare of the vessel. *See* 46 U.S.C. § 10101(3); Norris, *The Law of Seamen,* §§ 2.1, 2.3, 2.10 (4th ed. 1985); *Norman v. Aubrey Burke & Assoc.,* 585 F.Supp. 494 (E.D. La. 1984).

In contrast, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.,* defines "seamen" much more narrowly for purposes of exemption from *federal* overtime provisions. 29 U.S.C. § 213(b)(6). Under the FLSA, a "seaman" is an individual who performs service "primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character." 29 C.F.R. § 783.31. For enforcement purposes, the federal Wage and Hour Administrator's position is that work of a different character is "substantial" if it occupies more than 20 percent of the time worked by an employee during any given workweek. *Id.* at § 783.37. However, the term "seaman" covers all types of crewmembers including, for example, sailors, engineers, radio operators, firemen, pursers, surgeons, cooks and stewards. *Id.* at § 783.32.

Those employees who are exempt under the FLSA will be referred to as "seamen." Those employees who fall within the general admiralty definition but not under the FLSA exemption, will be referred to as "maritime employees." However, it should be noted that all of these employees work in situations covered by admiralty law, *i.e.,* on vessels on navigable waters. *See* 14 Wright, Miller & Cooper, Federal Practice and Procedures: Jurisdiction 2d § 3671, p. 412 (cases cited therein); *In re Paradise Holdings, Inc.,* 619 F. Supp. 21, 22 (C.D. Cal. 1984),[1] *aff'd,* 795 F.2d 756 (9th Cir.), *cert. denied,* 107 S.Ct. 649 (1986).

For territorial purposes, "navigable waters" are divided into three zones. The zone inland from a nation's shores is referred to as the inland or internal waters zone. These waters (*e.g.,* bays and inlets) are subject to the complete sovereignty of the coastal nation. The second zone, measured seaward from the nation's coast, is comprised of a three-mile belt known as the marginal or territorial sea. A coastal nation may exercise extensive control over the territorial zone, but cannot deny the right of innocent passage to foreign nations. The third zone lies beyond the territorial sea and is referred to as the "high seas." This zone consists of international waters that are not subject to the dominion of any nation. *See United States v. Alaska,* 422 U.S. 184, 196-97 (1975).

Most of the rights and obligations of shipowners and seamen have been codified in 46 U.S.C. § 2101, *et. seq.* (the Shipping Act). The Act divides shipping routes into three categories — foreign, intercoastal and coastwise voyages. Foreign voyages consist of voyages between ports in different countries. 46 U.S.C. § 10301(a)(1). Intercoastal voyages consist of voyages between ports on the Atlantic and Pacific coasts. 46 U.S.C. § 10301(a)(2). Coastwise

voyages consist of voyages between ports in different states (except adjoining states). 46 U.S.C. § 10501(a). In addition, the United States Coast Guard defines coastwise vessels as those "normally navigating the waters of any ocean or the Gulf of Mexico 20 nautical miles or less off-shore." 46 C.F.R. § 70.10-13. *See, e.g., Sewell v. M/V Point Barrow,* 556 F.Supp. 168 (D. Alaska 1983) (seamen on vessels engaged in offshore test drilling operations on high seas employed on coastwise vessels).

The crewmembers whose claims precipitated this action were not on "voyages" that fall under any of these three categories. Their vessels either stayed on the high seas surrounding the oil rigs or "voyaged" between one port and the oil rigs. Therefore, a number of wage provisions in the Shipping Act do not apply to the affected crewmembers.

The vessels are, however, covered by a number of other Shipping Act provisions, as well as Coast Guard regulations. For example, some provisions limit the number of hours a crewmember can work to no more than 12 of 24 hours at sea and require a seagoing crew to be divided into at least two watches. 46 U.S.C. § 8104. In addition, all seamen and maritime employees are covered by a wide range of "protection and relief" statutes that govern, for example, health, taxes and attachment of wages. 46 U.S.C. §§ 11101-11112.

B. *The Parties*

Plaintiffs Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine Service Association and Western Oil & Gas Association are maritime trade associations that collectively represent over one hundred maritime employers, including plaintiff Clean Seas and Intervenor Tidewater Marine,

Inc. The plaintiff trade associations often represent their members before local, state and federal legislative bodies, and initiate proceedings in state and federal courts to protect the interests of their members. Many of the plaintiff trade associations' members maintain business offices in California and provide maritime employment on American flag vessels to California residents, as well as to residents of other states. The maritime employers own and operate a variety of vessels registered pursuant to federal law. These vessels engage in foreign, intercoastal and coastwise voyages.

Most of the employees who are the subject of this action were or are employed by Clean Seas. Clean Seas is an unincorporated, cooperative association formed by several major oil companies. It contains and cleans up marine oil spills. It also performs other maritime activities to fulfill federal environmental protection requirements. In order to perform its duties, Clean Seas operates three American flag vessels under the names of *Mr. Clean, Mr. Clean II* and *Mr. Clean III. Mr. Clean* and *Mr. Clean II* are "bareboat charter" vessels. *Mr. Clean III* is owned by Clean Seas. *Mr. Clean II* is a 138 foot marine vessel moored in Port San Luis Harbor, California, about one-quarter mile from the shore. It remains moored approximately 90% of the time. The owners of *Mr. Clean II* contracted with Clean Seas to provide the vessel and its operating crew, and to operate the vessel pursuant to Clean Seas needs. Most of *Mr. Clean II's* duties involve control and cleanup of oil spills and related environmental discharge work in the Santa Barbara Channel.

Mr. Clean III is a 181 foot, 292 gross ton ocean-going vessel permanently stationed on the high seas over the Pedernales and Arguello oil fields on the Outer Continental Shelf.[2] These oil fields are located four to ten nautical

miles off the California coast and contain four oil drilling and production platforms. Each of these platforms is located six to seven nautical miles off the California coast. Except when on active duty, *Mr. Clean III* remains tied to a buoy anchored to the seabed approximately seven nautical miles off the California coast. Since June, 1986, *Mr. Clean III* has been on station, except during two months of extended repairs, and during occasional visits to port for minor repairs, resupply or the annual Coast Guard inspections. Crewmembers assigned to *Mr. Clean III* travel by helicopter from the Santa Barbara Airport to the vessel at the beginning of their service and return via helicopter at the end.

Intervenors Tidewater Marine Service and Western Boat Operators (collectively Tidewater) provide offshore transportation and support services throughout the world and have provided crew and supply boat services to offshore oil drilling platforms off the California coast since 1964. In the Santa Barbara Channel, Tidewater provides transportation services to a number of oil drilling platforms ranging in distance from one to twelve nautical miles off the coast. When a vessel is called, it goes to a pier to pick up cargo or passengers, travels to its destination (usually an offshore platform) and then returns to the pier or its mooring buoy.

The Labor Commissioner's duties include administering and enforcing compliance with many of California's labor laws, including the state's wage and hour laws. Don C. Craib (Craib), is the Senior Deputy Labor Commissioner in DLSE's Santa Barbara office. In all matters pertinent to this action, Craib is authorized to act on behalf of the Labor Commissioner.

At the base of this legal dispute lie the employees: the three crewmembers of *Mr. Clean II*[3] and nine

crewmembers assigned to Mr. Clean III.[4] All twelve appear to be California residents in that they have California addresses. Two of the crewmembers were licensed mates and ten were certified as "seamen" by the Coast Guard; the ten worked primarily on the "clean-up"operations. Nine of those ten had written employment agreements. In February 1988, Tidewater employee Frank Kleman (Kleman), also filed a complaint for overtime compensation with the DLSE. Tidewater had employed Kleman as a "deckhand" on a crewboat from July 1, 1981, through February 2, 1986, when he took a medical leave of absence.[5]

C. *The Factual Setting*

Although the Labor Commissioner continues to quibble over the definition of "seamen," all of the employees are either seamen or maritime employees. The parties agree that the wage claims of these crewmembers are governed by admiralty law. The issue in this case is whether California wage and hour laws should be applied as part of federal admiralty law in adjudicating the wage claims of maritime employees who work on the high seas and of seamen who work both on the high seas and within the territorial zone. *See East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 864 (1985).

The Cal. Lab. Code empowers the Labor Commissioner and his agents to (i) investigate employee complaints concerning wages, (ii) conduct administrative hearings for the purpose of resolving wage claims, (iii) issue orders, decisions and awards, (iv) assess liability and impose monetary sanctions and penalties, and (v) prosecute actions in court to enforce California's wage and hour laws. Cal. Lab. Code § 98. Cal. Lab. Code § 1173 grants the Industrial Welfare Commission (IWC)

authority to regulate the wages, hours and working conditions of those employees employed in the State of California. IWC Wage Order 4-80 covers "professional, technical, clerical, mechanical, and similar occupations." Cal. Adm. Code § 11345(2)(c). Based on his interpretation of his statutory authority, the Labor Commissioner applied Wage Order 4-80 to the crewmembers and awarded sizable overtime compensation.

The Labor Commissioner based his decision covering the crewmembers of *Mr. Clean II* on the fact that *Mr. Clean II* is moored in California's territorial waters and that a substantial part of the vessel's operation occurs within those waters. Therefore, he determined that crewmembers on *Mr. Clean II* fell under the jurisdiction of California's laws and regulations governing employer and employee relationships, and that neither the FLSA nor other maritime statutes preempt California's laws.

Prior to the hearing of *Mr. Clean III* crewmembers' individual claims, plaintiffs separately challenged the Labor Commissioner's jurisdiction; that challenge was rejected. Because of that prior ruling, the decision covering *Mr. Clean III's* crewmembers does not discuss any jurisdictional issues; specifically, it makes no distinction between vessels moored one-quarter mile from shore and those moored seven miles from shore. The Labor Commissioner did determine that whether or not the wage claimants were FLSA-exempt seamen does not preclude California's authority to regulate seamen independent of any federal jurisdiction.

The Labor Commissioner has stayed all similar DLSE proceedings pending the outcome of this action, including Kleman's claims. However, in his answers to interrogatories and in Craib's deposition testimony, the Labor Commissioner discussed (hypothetically) his views of the

Labor Commissioner's jurisdiction. In his deposition, Craib stated that DLSE would have jurisdiction over claims of employees on a boat stationed outside California's territorial boundaries, even if the employees were not California residents. (Ex.109 at 124-28.) ("I'm saying that we may properly exercise jurisdiction over and adjudicate the wage claim of a non-California resident whose primary work situs is outside the territorial bounds of California . . . My attorney said we have jurisdiction.")

Similarly, in his response to plaintiff's interrogatories, the Labor Commissioner claimed the right to assert jurisdiction over both non-California residents and California residents employed as seamen on a United States vessel that is permanently stationed outside the territorial boundaries of California. (Ex. 112 at 188-89.) This jurisdictional assertion was based on the fact that "[s]eaman is an inhabitant of California; and the vessel is not engaged in foreign and/or intercoastal voyages. California is exercising its police powers for the general welfare of its inhabitants."

D. *Plaintiffs' Claims*

Although plaintiffs purport to state three separate claims for relief, all three claims raise similar arguments and, in fact, are but one and the same claim. In substance, plaintiffs claim that California labor laws conflict with federal admiralty law, place a burden on maritime commerce and represent an impermissible arrogation of power on the part of a state to extend its territorial boundaries and exercise its sovereignty over the high seas. Intervenors' claims are similar.

Plaintiffs and intervenors seek a declaratory judgment that all California wage, hours and working condition laws are inapplicable to maritime employees whose work

situs is a vessel on the high seas and to all seamen, regardless of their work situs. In addition, both seek permanently to enjoin the Labor Commissioner from enforcing these state laws against them or their members.

II.

DISCUSSION

Before reaching the substance of this legal dispute, it is necessary to address two preliminary issues raised by the parties.

A. *Jurisdiction*

The Labor Commission contends that the action should be dismissed for lack of subject matter jurisdiction. He argues that by bringing this as a declaratory judgment action, plaintiffs have not changed their preemption assertion from its essential nature as a defense. *See e.g.*, *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 685 F.2d 1088, 1090 (9th Cir. 1982) (employer's anticipation of a federal defense of preemption by Title VII of employee's state discrimination claim insufficient to provide basis for federal question jurisdiction.)

The present case, however, involves a request for coercive injunctive relief, in addition to declaratory relief. In such a situation, the Supreme Court has recognized that federal question jurisdiction is appropriate:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal

> question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n. 14 (1983) (citations omitted). *Accord, Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 n.20 (1983) ("A person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations and a declaratory judgment action by the same person does not necessarily run afoul of the *Skelly Oil* doctrine.").

In *Southern Pacific Transp. Co. v. Public Util. Comm'n*, 716 F.2d 1285, 1288 (9th Cir. 1983), the Ninth Circuit, applying *Shaw*, held that *Miller-Wohl* applies when *only* declaratory relief is sought. When, as here, plaintiffs also seek an injunction, federal question jurisdiction is proper. *Id.*[6]

B. *Scope of Declaratory Relief*

In their Complaint, plaintiffs request that this court adjudge "the legal rights and obligations of maritime employers with respect to their employment of seamen and/or other maritime workers on vessels normally situated on the high seas. . . ." In addition, Tidewater seeks a ruling covering all of its seamen, regardless of their work situs. The Labor Commissioner contends that plaintiffs and intervenors seek a declaratory judgment not on matters in controversy, but rather the adjudication of a future hypothetical controversy.

The Supreme Court has spoken often on the question of whether a situation presents an Article III case or controversy:

> The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."
>
> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297-98 (1979) (citations omitted). The parties do not dispute that a real controversy exists between the Labor Commissioner and the employers of the affected crewmembers. Instead, they dispute whether the remaining plaintiffs have demonstrated a realistic danger of sustaining a direct injury as a result of the Wage Order's enforcement.

According to the Labor Commissioner, plaintiff's request for relief is too broad because there is no evidence that the Labor Commissioner threatens to enforce California labor laws except with regards to the "affected employees" of Clean Seas and Tidewater. The Labor Commissioner claims that he will not exercise jurisdiction over non-inhabitants; however, this representation is directly contradicted by his answers to interrogatories and

Craib's deposition testimony. He is bound by the latter. *Radobenko v. Automated Equip. Corp.,* 520 F.2d 540, 544 (9th Cir. 1975) (party may not create issue of fact on a summary judgment motion by contradicting his own deposition). He also maintains that no evidence suggests that workers employed by other members of the plaintiff associations are affected by his overtime awards to Clean Seas' employees; thus, that any relief should be narrowly tailored.

Although this contention is not without merit, the argument goes too far. The rights of three other groups are directly at stake. The first group consists of the remaining crewmembers of *Mr. Clean III,* at least some of whom would be eligible to bring similar claims for overtime compensation. Further, *Mr. Clean III* still employs seven of the nine employees who were awarded overtime by the Labor Commissioner. Therefore, Clean Seas faces additional liability. Tidewater also faces similar, potential liability from its remaining crewmembers.

The second group is employers with a direct stake in the outcome of this litigation and include those members of the plaintiff associations who employ seamen or other maritime employees on vessels on the high seas, but which do not engage in foreign or intercoastal voyages. Plaintiffs maintain that their members operate vessels, similar to those used by Clean Seas, on the high seas, that are not engaged in foreign or intercoastal voyages. The third group affected by this litigation is those employers that have seamen, like Klemen, working within the territorial zone.[7]

Plaintiffs also challenge a broader group of statutory provisions than the Labor Commissioner has attempted so far to apply. The Labor Commissioner has applied California's overtime compensation provision, specifically

IWC Wage Order 4-80, to seamen and maritime employees. In applying this Wage Order, he has also invoked a number of statutory provisions covering other wage and hour requirements. *E.g.,* Cal. Lab. Code §§ 200 (definitions), 201 (time for payment upon discharge), 203 (penalty for failure to make payment at required time), 204 (requirement of semimonthly payment), 226 (itemized statement of wages). Clearly, the Court can determine whether application of those provisions was proper. However, plaintiffs request that the Court determine the applicability of "all other provisions of California wage and hour law." The Labor Commissioner contends that there is no evidence that he will seek to enforce any other provisions of the Wage Order other than the overtime provision. The Court agrees; consequently, it will limit its review to the overtime provisions only and to any other wage and hour provisions intertwined with the overtime compensation provision.

C. *Does Maritime Law Preempt State Law*

Both sides recognize the need for uniform regulation under admiralty law. Norris, *supra,* § 1.3, p. 4-5, *citing Panama R. Co. v. Johnson,* 264 U.S. 375 (1924). Therefore, state laws which conflict with maritime law cannot be enforced. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 217 (1917); *Daughtry v. Diamond M Co.,* 693 F.Supp. 856, 861 (C.D. Cal. 1988). However, state laws that do not conflict may be incorporated into admiralty law and applied. 14 Wright & Miller, Federal Practice & Procedure: Jurisdiction 2d § 3671, pp. 421-422 (state law may not be applied to prejudice the characteristic features of maritime law or to disrupt the harmony it strives to bring to international and interstate relations); *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 341-42 (1973). Although a number of federal provisions do cover the overtime wages

of seamen on a variety of voyages, no federal maritime law *expressly* addresses the overtime pay of the seamen and other maritime workers such as those involved in the case at bench. Because of this absence of express federal provision, the Labor Commissioner contends that California labor laws do not conflict with federal law and are thus not preempted.

Plaintiffs' response is two-fold: First, although no federal maritime statute expressly addresses overtime compensation for the seamen and maritime employees involved in this action, the Shipping Act does govern other aspects of these employees' wages, hours and working conditions. Plaintiffs cannot, however, find safe harbor in this Act; defendant's exercise of jurisdiction conflicts directly with only one of its provisions. (When a seaman's wages must be paid. *Compare* 46 U.S.C. § 10313, *with* Cal. Lab. Code § 204.) In light of the general exemption of coastwise vessels *not* engaged on coastwise voyages from the comprehensive "burdensome requirements" of the Shipping Act, this one conflict does not seem sufficient to preempt California's overtime laws. *Inter-Island Nav. Co. v. Byrne,* 239 U.S. 459, 462-63 (1915).[8] Maritime statutes simply do not purport to govern the overtime wages of employees such as those in this action.

1. *FLSA v. State*

Plaintiffs next contend that, to the extent that seamen or maritime employees are not covered by federal maritime statutes, they are covered by the FLSA. This argument is much more persuasive.

Section 207(a) of the FLSA provides overtime pay for employees who are engaged in "commerce or in the production of goods for commerce." Although neither side cites any evidence that the maritime employees here fall

under the FLSA, it appears that the employees are tied closely enough to commerce (oil production) such that they are covered by the FLSA. *Wirtz v. Intravaia,* 375 F.2d 62, 65 (9th Cir.), *cert. denied,* 389 U.S. 844 (1967); *see also* 29 U.S.C. § 206(4) (expressly applying minimum wage to seamen); Friedell, *Benedict on Admiralty,* ¶ 104, pp. 7-6.

The FLSA constitutes a comprehensive, uniform and national system of wage and hour regulation. It provides maritime employers and employees with a uniform legal standard by which to ascertain their legal rights and obligations. It specifically exempts maritime workers, *i.e.,* seamen who are engaged primarily in the operation of a vessel. Further, the California overtime provisions and the FLSA provisions produce widely differing results. Plaintiffs contend that these conflicts establish that the FLSA preempts California labor provisions. In fact, the Labor Commissioner concedes that the FLSA would preempt state law, were it not for the FLSA's savings clause, 29 U.S.C. § 218(a).

2. *The FLSA Savings Clause*

The savings clause provides:

> "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter. . . ."

29 U.S.C. § 218(a). According to the Labor Commissioner, this savings clause expressly permits California to apply its overtime provisions (which are admittedly more

generous) to those non-exempt maritime employees who qualify under the FLSA.

However, the FLSA's savings clause cannot properly be construed to save state laws that seek to regulate the employment of maritime employees whose work situs is a vessel normally situated on the high seas. This is so because Congress may not constitutionally delegate its maritime jurisdiction to the states. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920); *see also Perez De La Cruz v. Crowley Towing & Transp. Co.,* 807 F.2d 1084, 1088 (1st Cir. 1986), *cert. denied,* 107 S. Ct. 2182 (1987) (Congress cannot delegate its maritime jurisdiction to the states, but can delegate it to Puerto Rico). Such a delegation would destroy the harmony and uniformity of admiralty law established by the Constitution. *Knickerbocker,* 253 U.S. at 164. Thus, under compulsion of the Constitution, the savings clause must be interpreted as not applying to maritime employees employed primarily on the high seas.

Although this argument lacks direct precedential support, common sense suggests that the uniformity of federal admiralty law would be destroyed if the states were permitted to "add on" to the federal law enacted by Congress. The maritime employees (and their employers) involved in the present action fall in the interstices between express federal maritime statutes. Nonetheless, because they are maritime employees and therefore subject to admiralty jurisdiction, they must be subject to uniform federal law. Therefore, California cannot apply its laws under the savings clause to destroy the nationwide uniformity of admiralty law.

This limiting construction of the FLSA's savings clause is similar to and consistent with the Supreme Court's limiting construction of the savings clause in the National Labor Relations Act (NLRA), 29 U.S.C. § 164(b). In *Oil,*

Chem. & Atomic Workers, Int'l Union, AFL-CIO v. Mobil Oil Corp., 426 U.S. 407 (1976), the Court adopted a "predominant job situs" test to determine when the NLRA's savings clause permits application of state "right-to-work" laws. Because the employees in *Mobil Oil* mostly worked on the high seas (outside the territorial bounds of the State of Texas), the Court held that Texas' right-to-work laws could not be applied to govern the agency-shop provision at issue. "It is therefore fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply." *Id.* at 420-21.

Mobil Oil strongly suggests that the FLSA's savings clause should be limited so that California cannot apply its overtime provisions to employees whose predominant job situs is on the high seas, outside the territorial bounds of California. *See also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223-229 (1986) (Death on the High Seas Act precludes application of state's wrongful death statute to accidents on the high seas *despite* savings clause preserving state statutory rights and remedies. "[W]e must infer that if Representative Mann and his colleagues intended affirmatively to require enforcement of state substantive law on the high seas, they would have taken care to make that requirement explicit.").

3. *FLSA Exempt Seamen*

Under the FLSA, seamen are exempt from federal overtime provisions. 29 U.S.C. § 213(b)(6). Federal law clearly preempts state law within the territorial zone if that state law conflicts with federal law. *See, e.g., Chevron U.S.A. Inc. v. Hammond*, 1980 A.M.C. 2416 (D. Alaska

1979). Congress has spoken directly on the issue of overtime pay for seamen. Therefore, California labor laws are preempted to the extent that they presume to regulate FLSA exempt seamen, both on the high seas and within the territorial zone. Further, given Congress' exemption of these seamen from even minimal federal overtime provisions, it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause.

D. *Supremacy Clause Preemption*

Plaintiffs next contend that California's wage and hours laws are preempted by the Supremacy Clause because California cannot extend its territorial boundaries and exercise sovereignty over the high seas. Basically, they argue that by asserting jurisdiction over employment on the high seas, defendant has "enlarged" its territorial boundaries into areas within exclusive federal sovereignty. The Labor Commissioner has not responded to this argument. It is, however, no more than a variation of the arguments discussed above, and so, needs no separate elaboration.

E. *Interstate Commerce*

Plaintiffs' final argument is that application of California's overtime provisions to vessels on the high seas places an unconstitutional burden on interstate and maritime commerce. This is but another variation on the theme discussed above. Plaintiffs contend that maritime employment on the high seas is so national in nature as to permit only one uniform system of regulation. Therefore, that any state law that intrudes on this area is preempted under the Supremacy Clause. While it does appear that California's "police power" interest is weak, in light of the need for uniform law governing employees on the high

seas, the Court need not reach this commerce clause argument.

III.

CONCLUSION

In light of the obvious conflict between California's overtime compensation provision and the FLSA, the FLSA preempts California's provisions. Therefore, California cannot apply its wage and hour provisions to seamen or to maritime employees employed primarily on the high seas. Plaintiffs' and intervenors' request for declaratory and injunctive relief is granted. However, the scope of the relief is limited to (i) the FLSA-exempt seamen, whether working within the territorial zone or on the high seas, and (ii) maritime employees working primarily on vessels on the high seas that are not engaged in foreign or intercoastal voyages.

DATED: March 1, 1989

/s/
A. WALLACE TASHIMA
United States District Judge

FOOTNOTES

[1] This is a case from the District of Hawaii which is mistakenly reported as a case from the Central District of California. *See* 795 F.2d at 757.

[2] The record contains no description of *Mr. Clean.*

[3] William Mason, Rich Schwin and Paul Susoeff.

[4] Kent Creighton, Kevin Darcy, Paul Feavel, Enrique Gutierrez, Charles Koch, Robert Jacobs, Jr., Ted Mueller, Peter Reyna and James Spencer.

[5] None of these crewmembers are represented individually in this action. All have made wage claims to the Labor Commissioner. In most of these cases, awards have been made and the employers' *de novo* review is pending in state superior court. *See* Cal. Lab. Code § 98.2. Through their attorneys, they have filed an *amici curiae* brief in support of the Labor Commissioner's position.

[6] Because the court has subject matter jurisdiction of this dispute under 28 U.S.C. § 1331, as one arising under the Constitution, it need not address the question of whether, nevertheless, it would have subject matter jurisdiction under 28 U.S.C. § 1333(1), as a case arising under its admiralty and maritime jurisdiction. *See U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351 (1971) (seaman's suit for wages is within admiralty jurisdiction); *Putnam v. Lower,* 236 F.2d 561, 570 (9th Cir. 1956) ("jurisdiction of courts of admiralty over the wage claims of seamen is anciently established").

[7] Because Tidewater contends that all of its employees are seamen, with respect to the territorial zone, this decision affects only seamen and does not determine the

rights of maritime employees working within that zone. That decision must await another day.

[8] *See, also* M/V Point Barrow, 556 F.Supp. at 170 (Alaska statute assessing employers' penalty of up to ninety days of wages for failure to comply with proper demand for payment compatible with federal maritime law governing seamen's wage claims; deletion of penalty from federal law "reflected congressional recognition that it would be impractical to apply the elaborate scheme of the Shipping Commissioners Act to all vessels engaged in coastwise trade").

WAGES, HOURS AND WORKING CONDITIONS ADMINISTRATIVE CODE SECTION 11040

Article 4. Professional, Technical, Clerical, Mechanical, and Similar Occupations (Order No. 4-80, Effective January 1, 1980)

§ 11040. Order Regulating Wages, Hours, and Working Conditions in Professional, Technical, Clerical, Mechanical, and Similar Occupations

1. *Applicability of Order.* This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $900.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. *Definitions.*

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to the following: accountants, agents, appraisers, artists; attendants; audio-visual technicians; bookkeepers, bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social

workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(I) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(J) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(L) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Wages" (See California Labor Code, Section 290)

(O) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(P) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. *Hours and Days of Work.*

(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of

eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of the above subsection (A) by instituting, pursuant to a written agreement voluntarily executed by the employer and at least two-thirds (⅔) of the affected employees before the performance of the work, a regularly scheduled week of work which includes not more than four (4) working days of not more than ten (10) hours each so long as the employee receives at least two (2) consecutive days off within each workweek, provided that:

(1) The employer is not required to pay the premium wage rate prescribed in subsection (A) for the 9th and 10th hours worked during such workdays;

(2) If an employee on such a four-day schedule is required or permitted to work more than ten (10) hours in any workday, the premium wage rate provisions in subsection (A) above shall apply to such employee for those hours worked in excess of the 10th hour of that work day;

(3) Any employee on such a schedule who is required or permitted to work on more than four (4) workdays shall be compensated at the rate of not less than one and one-half (1½) times the employee's regular rate of pay for the first eight (8) hours on such additional workdays and double the employee's

regular rate of pay for work in excess of eight (8) hours on those workdays.

(4) After a lapse of twelve (12) months and upon petition of a majority of the affected employees a new vote shall be held and a two-thirds (⅔) vote of the affected employees will be required to reverse the agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of the time for compliance.

(C) Provisions of subsections (A) and (B) above shall not apply to any employee whose earnings exceed one and one-half (1½) times the minimum wage if more than half (½) of that employee's compensation represents commissions.

(D) One and one-half (1½) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except that minors sixteen (16) and seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsections (A) or (B) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of

employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) Except as provided in subsections (D), (F) and (I), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(H) The provisions of this section are not applicable to (1) employees whose hours of service are regulated by the United States Department of Transportation Code of Federal Regulations, Title 49, sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code, Subchapter 6.5, section 1200 and following sections, regulating hours of drivers.

(I) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in Section 2(D).

4. *Minimum Wages.*

(A) Every employer shall pay to each employee wages not less than four dollars and twenty-five cents ($4.25) per hour for all hours worked, effective July 1, 1988, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five (85%) of the minimum wage rounded to the nearest nickel, provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five (25%) limitation on the employment of minors shall not apply during school vacations.

Note: Under certain conditions, the full minimum wage may be required for minors. See Labor Code Section 1391.2(b).

(3) TIPPED EMPLOYEES may be paid not less than $3.50 per hour. A tipped employee is an employee who is engaged in an occupation in which he or she customarily receives gratuities, as that term is defined in Labor Code Section 350(e), of not less than sixty dollar ($60.00) per month.

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the

payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. *Reporting Time Pay.*

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when: (1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. *Licenses for Handicapped Workers.* A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5.)

7. *Records.*

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations

cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. *Cash Shortage and Breakage.* No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willfull act, or by the gross negligence of the employee. Notwithstanding the foregoing provision, where an employee has the exclusive and personal control of cash funds of the employer and is required by the employer to account, under reasonable accounting procedures, for said funds, the employer may upon prior written notice require reimbursement from such employee for cash shortages.

9. *Uniforms and Equipment.*

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

Note: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regu-

larly indentured under the State Division of Apprenticeship Standards.

Note: This section shall not apply to protective equipment and set devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. *Meals and Lodging.*

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective July 1, 1988
Room occupied alone	$ 20.00 per week
Room shared	$ 16.50 per week
Apartment — two thirds (⅔) of the ordinary rental value, and in no event more than	$240.00 per month
Where a couple are both employed by the employer, two-thirds (⅔) of the ordinary rental value, and in no event more than	$355.00 per month
Meals:	
Breakfast	$1.50
Lunch	$2.10
Dinner	$2.80

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. *Meal Periods.*

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period

of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. *Rest Periods.* Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. *Change Rooms and Resting Facilities.*

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and

comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean and sanitary.

Note: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. *Seats.*

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. *Temperature.*

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. *Elevators.* Adequate elevators, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. *Exemptions.* If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 11, Meal Periods; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment of the time the application is filed with the Division.

18. *Filing Reports.* (See California Labor Code, Section 1174(a))

19. *Inspection.* (See California Labor Code, Section 1174)

20. *Penalties.* (See California Labor Code, Section 1199)

21. *Separability.* If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. *Posting of Order.* Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

DECLARATION OF CAPTAIN ROBERT A. JANECEK, USCG (RET.)

Captain Robert A. Janecek declares:

1. I am a retired Captain of the United States Coast Guard, and I currently work as an independent marine consultant, surveyor and safety inspector. I served in the Coast Guard more than 30 years, during which I had broad experience in all facets of the Coast Guard's work. I retired from the Coast Guard on June 30, 1988, with an Honorable Discharge. I was recalled to active duty during this past summer to supervise the Coast Guard's involvement in the America's Cup, completing that assignment at the end of September 1988.

2. My work in the Coast Guard generally included vessel inspections; port and environmental safety and management; marine casualty and personal injury investigations; enforcement of Coast Guard regulations; vessel operations; and drafting maritime policies, procedures and regulations.

3. During my final active duty assignment in the Coast Guard, I served from June 1986 through June 1988 as the Officer in Charge of the Los Angeles/Long Beach Zone. That Zone extends from Dana Point in the south to Point Conception in the north, including the Santa Barbara Channel. As Officer in Charge, I managed over 250 employees involved in diversified operations, including all Coast Guard vessel inspections in our Zone.

4. As part of all United States vessel inspections, the Coast Guard issues a document entitled "Certificate of Inspection," which lists certain information about the vessel and the conditions under which it may be operated. When I was Officer in Charge of the Los Angeles/Long Beach Zone, all Certificates of Inspection were issued

under my direction and approval. Although some Certificates of Inspection may bear the name of a Coast Guard officer other than myself, I had overall responsibility for their issuance and another name appears only because I was absent on the date in question.

5. The Certificates of Inspection issued under my direction and approval included certificates for the supply and crew boats used in servicing the offshore platforms in the Santa Barbara Channel. This included the supply and crew boats operated in the Santa Barbara Channel by Tidewater Marine Service, Inc., and Western Boat Operators, Inc. (collectively "Tidewater").

6. By way of example, the Coast Guard Certificate of Inspection issued for the Tidewater vessel *Smith Tide* was issued under my direction and approval. The Certificate of Inspection for *Smith Tide* is attached to this declaration as Exhibit A. The Certificate of Inspection for the Tidewater vessel *Manny Tide* (which I understand has previously been introduced as an exhibit in this case) was issued a short time before I became Officer in Charge of the Los Angeles/Long Beach Zone but under the same standards applied to *Smith Tide.*

7. In issuing Certificates of Inspection for vessels such as *Manny Tide* and *Smith Tide,* the Coast Guard examines a variety of factors that are specified by the federal maritime laws and regulations of the United States. These include the vessel manning requirements, total passengers, geographic area of operation, specified conditions of operation, and necessary safety equipment. In examining these factors, the Coast Guard is concerned about the safety and welfare of the vessel, its crew and its passengers, based upon standard government regulations and the unique specifications and working conditions of the vessel in question.

8. By way of example, the Certificates of Inspection for *Manny Tide* and *Smith Tide* both reveal crew boats that are 65 feet in length and 75 gross tons. The certificates specify the number of operators and crew required for the vessel under its various operating conditions, including ocean and coastwise routes. Although they concern basically the same kind of vessel, one can see slight differences in these Certificates of Inspection, reflecting the unique configuration of each vessel.

9. I understand that one of the parties in Tidewater's lawsuit against the California Labor Commissioner has argued that the Coast Guard and other federal maritime authorities exercise no jurisdiction over the working conditions and hours of work on offshore crew and supply vessels such as those operated by Tidewater in the Santa Barbara Channel. That assertion is absolutely incorrect.

10. In the first place, the whole idea of vessel inspections and Certificates of Inspection by the Coast Guard is to specify the overall safe operating conditions of each vessel. That necessarily includes the welfare and working conditions of the crew, as a vessel cannot be operated safely if the crew is overworked or overextended. That is why Coast Guard Certificates of Inspection specify the manning requirements for each vessel under its various operating conditions.

11. In addition, there are federal maritime laws that specifically govern working hours and conditions of work on these kinds of vessels. For example, Title 46, Section 8104 of the United States Code specifies:

> "(b) On an oceangoing or coastwise vessel of not more than 100 gross tons (except a fishing, fish processing, or fish tender vessel), a licensed individual may not be required to work more than 9 of

> 24 hours when in port, including the date of arrival, or more than 12 of 24 hours at sea, except in an emergency when life or property are endangered."
>
> "(g) On a towing vessel (except a vessel to which subsection (c) of this section applies), an offshore supply vessel, or a barge to which this section applies, that is engaged in a voyage of less than 600 miles, the licensed individuals and crewmembers (except the coal passers, firemen, oilers, and water tenders), may be divided, when at sea, into at least 2 watches."

Even more detailed specifications of vessel manning requirements and hours of work can be found in regulations adopted by the Coast Guard and reported in Title 46 of the Code of Federal Regulations.

12. These specifications are reflected in the Certificates of Inspection for Tidewater vessels such as *Manny Tide* and *Smith Tide*. Those certificates therefore provide that the vessel's normal crew of 2 operators and 2 deckhands may be reduced to 1 operator and 1 deckhand "when the vessel is away from a shoreside dock or safe mooring buoy *for not more than 12 hours in any 24 hour period*." (Emphasis added.) This specification of hours is consistent with the Coast Guard's interpretation of the requirements of Section 8104 of Title 46, quoted above, that no individual may be required to work more than 12 of 24 hours at sea for vessels of this kind.

13. Historically these vessels operate on a 24 hour a day basis with a normal workday for seamen (including officers) being up to but not exceeding 12 hours per day while the vessel is at sea. The actual hours worked (up to 12 hours) is quite flexible and depends upon the operations the vessel is engaged in. In all of the years I have

been involved in supervising the manning requirements for crew boats and supply boats of the type operated by Tidewater, I have always considered and understood the 12 hour shift to be the normal workday for seamen (including officers) serving on these type vessels.

I declare under penalty of perjury under the laws of the United States of America including the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Invergordon, Scotland, on November 11, 1988.

/s/
Capt. Robert A. Janecek
USCG (Ret.)

Supreme Court, U.S.
FILED
NOV 13 1991
OFFICE OF THE CLERK

(2) (3)

Nos. 91-142 and 91-349

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

TIDEWATER MARINE SERVICE, INC., *etc., et al.*,
and
PACIFIC MERCHANT SHIPPING ASSOCIATION, *etc., et al.*,
Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, AND DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents are the officials mandated by California law to enforce all of the labor laws of the State of California the enforcement of which is not specifically vested in any other officer, board or commission. (California Labor Code §95) Among other labor laws, Respondents enforce the Industrial Welfare Commission Orders regulating the maximum working hours of, among others, California residents employed on vessels either (1) stationed on the high seas surrounding oil rigs off the California coast, or (2) engaged in "voyages" between one port in California and the oil rigs, but *which are not engaged in foreign, intercoastal or coastwise voyages.*

The questions for review are:

1. Does the express exemption of seamen from the maximum hour provisions of the Fair Labor Standards Act found at Section 13(b)(6) have the effect of preempting the actions of the Respondents in this regard?

2. Does the State of California's enforcement of its law regulating the maximum hours of the above-described workers interfere with the need for uniformity in the application of admiralty law?

3. Does the fact that the workers' predominant worksite is exclusively located on the high seas directly off the coast of California preclude the State from regulating the maximum hours of workers whose only contact is with the State of California?

LIST OF PARTIES

The Petitioners in this Court (No. 91-142) are Tidewater Marine Service, Inc., and Western Boat Operators, Inc. who were intervenor plaintiffs-appellees in the trial and appellate proceedings.

Additionally, Petitioners in this Court (No. 91-349) are Pacific Merchant Shipping Association, Clean Seas, American Institute of Merchant Shipping, Offshore Marine Service Association, and Western Oil & Gas Association who were plaintiffs-appellees in the trial and appellate proceedings and have filed a separate but related petition pursuant to Rule 19.4.

The Respondent in this Court to both petitions is Lloyd W. Aubry, Jr., Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, who was the defendant-appellant in the trial and appellate proceedings below. Respondent's opposition herein is to both of the above-referred petitions.

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STATEMENT OF THE CASE

I.

BACKGROUND

Since the landmark case of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) there has been little question that the police power of the individual states encompasses the regulation of the wages, hours and working conditions of workers under its jurisdiction. Congress recognized this power when enacting the Fair Labor Standards Act and specifically provided that "No provision of this chapter or any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter..." 29 U.S.C. §218(a) The California Industrial Welfare Commission (hereinafter "IWC") has adopted maximum workweeks[1] which are lower than those established by the Fair Labor Standards Act. Any work performed in excess of eight hours

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[1]There are sixteen separate Industrial Welfare Commission Orders. The Orders are found at Title 8, California Code of Regulations, §§ 11000 et seq. Twelve of the Orders regulate wages, hours and working conditions in specific industries (i.e., manufacturing, public housekeeping, transportation, etc.). Three IWC Orders cover occupations and there is one general minimum wage order applicable to all California employees. Of the "occupation orders" Order 14-80 covers agricultural occupations; Order 15-86 regulates the private household occupations, and Order 4-80 (now superseded by Order 4-89) applies to "all persons employed in professional, technical, clerical, mechanical, and similar occupations...unless such occupation is performed in an industry covered by an industry order of this Commission..." Simply put, Order 4 covers all workers not specifically exempted from coverage who are not covered by another order.

in any one workday or forty hours in any one workweek must be compensated at appropriate premium levels[2].

The Division of Labor Standards Enforcement (DLSE) is the California agency mandated to interpret and enforce the provisions of the Industrial Welfare Commission Orders.[3] Historically, the DLSE has enforced the applicable provisions of the IWC Orders in the so-called maritime industries when the workers' sole contact is with the State of California. This same enforcement policy is utilized with respect to workers employed in the maritime industry when, for example, the workers are engaged in transportation on water within the jurisdiction of the State of California or engaged in commercial or recreational fishing[4]. The IWC Orders are also applied to vessels engaged in transportation on water within the jurisdiction of the State of California[5].

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[2]Most of the Orders required time and one-half the regular rate for hours in excess of eight and double the regular rate for hours in excess of twelve.

[3]Labor Code §§ 1195, 1195.5, 1198.3, 1198.4. See also, *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239; *Aguilar v. Association of Retarded Citizens* (1991) ___ Cal.App.3d ___, 285 Cal.Rptr. 515.

[4]In 1986 the California Legislature amended the Labor Code to provide that henceforth workers employed on licensed fishing vessels would not be subject to the provisions of the IWC Orders. (Calif. Labor Code §1182.3) The stated intent of the Legislature was to "make California law consistent with federal law with regard to minimum wages and maximum hours in the *commercial fishing industry.*" (Emphasis added)

[5]IWC Order 9-80 (now superseded by Order 9-90) defines the "Transportation Industry" as "...any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway air, or *water*, and all operations and services in connection therewith..." (Emphasis added)

Congress, in adopting the Fair Labor Standards Act chose to exempt "seamen" from both the minimum wage and overtime provisions[6], and in 1961, amended the Act to provide minimum wage protection to seamen; but Congress refused to extend the protections of overtime to these workers.[7] As evidenced by the minutes of the Joint Congressional Hearings, the reasons for these exemptions are manifold and involve the unique nature of the transportation industry in general as well as concerns in the maritime industry.

Originally, representatives of the principal labor organizations representing both seamen and other transportation workers testified orally and in writing that the peculiar needs of the *transportation* industry and the fact that the industry was already under special governmental regulation made it unwise to bring transportation workers within the scope of the proposed legislation[8]. Based on this testimony Congress exempted all seamen and certain other transportation workers from the protections of the Fair Labor Standards Act. The rationale for seeking the exemption put forward by the National Maritime Union was that without that exemption the "proposed Labor Standards Board" would have "jurisdiction over those classes of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the

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[6]52 Stat. 1067 §13(a)(3), c. 676 (1938).

[7]75 Stat. 71, §9 and §10 (1961)

[8]Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 545, 546, 547, 549, 1216, 1217.

jurisdiction of the government machinery set up to handle these problems."[9]

As the Circuit Court has noted:

> "The legislative history of the FLSA does show that Congress considered the special circumstances of maritime and other types of labor when it exempted seamen and other employees from the FLSA's overtime and minimum wage provisions. Federal Amicus argues, however, and we agree, that in exempting seamen from coverage under the 1938 act's overtime and minimum wage provisions, Congress intended to prevent overlapping regulation of wage and hour conditions of seamen by differing *federal* agencies." (Emphasis added) (Appendix to TIDEWATER's Petition For Writ Of Certiorari [hereinafter "Appendix"], at page A-17)[10]

However, there is nothing in the legislative record of the Fair Labor Standards Act which could lead to the conclusion that Congress intended to deprive the *states* of the right to

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[9]Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 544-549. Under the original proposal, all wage and hour claims arising under the FLSA were to be handled by a new Labor Standards Board. At the time Congress was considering the proposed legislation, however, maritime employees' wage and hour claims were handled by the Maritime Commission under the Merchant Marine Act of 1936. It was a concern that organized labor's gains already achieved by the maritime workers before the Maritime Commission could be jeopardized which led labor leaders to seek the exemption.

[10]For purposes of convenience and consistency, all future references to the "Appendix" refers to the Appendix to TIDEWATER'S Petition for Writ of Certiorari.

regulate the maximum workweek of seamen or any other classification of workers.

Further, under the facts in this case, neither the District Court nor the Ninth Circuit could find any conflict between federal admiralty law or regulations and the California Industrial Welfare Commission Orders. In addition, there is no showing that the exercise by the State of California of its inherent police power to regulate the wages of its workers employed in the same circumstances as those of the workers involved in this matter requires a delegation by Congress of that body's power to "alter, amend or revise the maritime law by statutes of general application."

II.

THE FACTS

This case originally arose as a result of complaints filed with the office of the California State Labor Commissioner, chief of the Division of Labor Standards Enforcement ("DLSE"), by workers[11] employed on board the Vessels Mr. Clean II and Mr. Clean III alleging failure of their employer, CLEAN SEAS[12], to pay premium wages for hours in excess of eight in a workday or forty in a workweek.

The two CLEAN SEAS vessels' duties involve control and clean up of oil spills and other environmentally

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[11]Twelve "Clean Seas" employees, all found by the District Court to be residents of the State of California, are involved.

[12]CLEAN SEAS is an unincorporated, cooperative association, formed by several major oil companies to contain and clean up marine spills off the California coast. (Appendix at A-5)

hazardous discharges in the Santa Barbara Channel off the California coast. *Mr. Clean II* is a 138-foot vessel moored in Port San Luis Harbor, California, where is remains about 90 percent of the time. *Mr Clean III* is a 181-foot vessel permanently stationed on the high seas off the California coast. *Mr. Clean III* conducts containment and clean up operations around four oil drilling and production platforms over the Pedernales and Arguello oil fields, from four to ten nautical miles off the California coast. When not on active duty, *Mr. Clean III* is tied to a buoy approximately seven miles off the California coast.[13]

Prior to the scheduling of any hearing on the merits of the complaints, CLEAN SEAS challenged the jurisdiction of the Labor Commissioner in letters directed to DLSE Headquarters in San Francisco. The jurisdictional challenge was denied by the DLSE. After the denial of the jurisdictional challenge, hearings were held pursuant to the provisions of the California Labor Code by a hearing officer in the DLSE offices in Santa Barbara, California.

At the hearings on the merits of the complaints, the Hearing Officer obviously determined that the CLEAN SEAS vessels were not engaged in any industry covered by an "industry order" promulgated by the Industrial Welfare Commission, but were engaged in occupations covered by IWC Order 4-80 (technical, mechanical and similar occu-

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[13]Notwithstanding the unsupported statement of Petitioner Pacific Merchant Shipping Association (hereinafter "PMSA"), there is nothing in the record to indicate that any of the Clean Seas vessels involved here ever left their stations. Both the District Court and the Ninth Circuit found, as a matter of fact, that these vessels were stationed directly off the coast of California and operated exclusively in waters directly off the California coast.

pations).[14] The hearing officer found that the workers were required to work twelve hours per day, seven days per week, on a rotating schedule which provided for seven days aboard the vessels and seven days ashore. The hearing officer found that the workers were entitled to recover overtime wages from their employer, CLEAN SEAS.

CLEAN SEAS filed timely notices of appeal of the orders, decisions and awards of the Labor Commissioner to the appropriate California Superior Court as provided by state law. These *de novo* appeals are currently pending in the state superior court. CLEAN SEAS joined by Pacific Merchant Shipping Association and the other maritime trade associations, (hereinafter collectively referred to as "PMSA") also filed a complaint in the Federal District Court for the Central District of California seeking declaratory and injunctive relief that California's labor laws are preempted by

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[14]At footnote 12 of the Petition for Certiorari filed by Pacific Merchant Shipping the Petitioner concludes that because of the differences between the Fair Labor Standards Act and the California Industrial Welfare Commission Orders the "non-exempt maritime employee working the *same* schedule...for the *same* employer on the *same* vessel would be entitled to $1,052 *more per week* under California law than he would under federal law." What Petitioner fails to point out is that because of the differences between the Industrial Welfare Commission Orders and the FLSA this same result would apply to a variety of workers. As an example, the FLSA treats those employed on small newspapers (29 U.S.C. 213(a)(8)); mechanics, drivers and helpers (29 U.S.C. §213(B)(1)), and salesmen, partsmen and mechanics engaged in selling or servicing automobiles, trucks, or farm implements (29 U.S.C. 213(b)(10)(A)) differently from the way those same workers are treated under the California law. The differences are not a result of contrasting the situation of "land-based" and maritime employees; the difference in the treatment of these workers under California law as opposed to the treatment they would receive under the FLSA is the result of differing interpretations as to the needs of the workers made by the legislative bodies involved.

federal admiralty law and the United States Constitution insofar as they purport to regulate the wages, hours and working conditions of maritime employees.

Subsequent to the complaints filed with the Labor Commissioner by the CLEAN SEAS workers, an employee (Frank Kleman) of Tidewater Marine Service, Inc. ("TIDEWATER") filed a complaint with the Labor Commissioner alleging failure by TIDEWATER to pay overtime wages. Typically, TIDEWATER employees, like those of CLEAN SEAS, work 7-day hitches of 12-hour days alternating with 7-day rest periods onshore. Upon receipt of notification of the filing of the complaint by Kleman, TIDEWATER intervened in support of PMSA and CLEAN SEAS in the federal action.

There has been no administrative hearing held in regards to the complaint of Mr. Kleman or any other employee of TIDEWATER and no determination has been made regarding which, if any, of the Industrial Welfare Commission Orders would cover Mr. Kleman's employment.[15]

The Labor Commissioner has stayed all similar DLSE administrative proceedings pending the outcome of this action.

In summary, the undisputed facts clearly establish that the workers involved in this case were California residents employed on vessels moored at varying distances directly off the California coast or operating from California ports exclusively in areas directly off the California coast. These vessels have no contact with any other of the several states or with any foreign nation.

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[15]See applicability of IWC Orders to employers engaged in the "Transportation Industry" at footnote 5, *supra*.

III.

THE PROCEEDINGS BELOW

This action was originally filed by PMSA, Clean Seas and the several maritime trade associations after the California state Labor Commissioner had determined, after administrative hearings, that twelve workers employed aboard its vessels operating in the Santa Barbara Channel were entitled to recover overtime compensation pursuant to California law for hours in excess of eight in any one day or forty in any one week. This Federal action was filed at or near the time of the filing of the state court appeals of the Labor Commissioner's rulings. TIDEWATER was permitted to intervene in the action in June, 1988.

Following cross-motions for summary judgment, the District Court granted summary judgment in favor of Plaintiffs on March 1, 1989. The District Court held that inasmuch as Congress may not delegate its maritime jurisdiction, the savings clause of the Fair Labor Standards Act (29 U.S.C. 18(a)) does not apply to maritime employees. As a result, the District court held, the state of California could not exercise its police power in this area.

The District Court held that while "[m]aritime statutes simply do not purport to govern the overtime wages of employees such as those in this action," since Congress had exempted seamen from the overtime requirements under the FLSA, "common sense" dictated that it would be at odds with the federal scheme to permit the states to enforce stricter overtime provisions via the FLSA's savings clause. (Appendix at A-64)

The Labor Commissioner appealed the District Court's ruling and, joined by The United States of America as *amicus curiae,* argued that there exists no conflict between

the FLSA and the California overtime provisions and the award of overtime pay to the workers is neither inconsistent with, nor precluded by, federal admiralty law.

The Ninth Circuit reversed the District Court in an opinion filed November 13, 1990, holding that:

> "In contrast to the [State of] California's strong interests, Federal interests in precluding enforcement of California's overtime provisions in this case are relatively weak. There is no indication that Congress, in enacting the FLSA's savings clause, intended to preempt states from according more generous protection to maritime employees on the high seas off a state's coastal waters. Further, the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA. (Appendix, p. A-33) (Emphasis in original)

The Circuit Court went on to note that inasmuch as the workers involved are California residents who work on vessels that operate exclusively off the California coast, application of the state's overtime law will not disrupt international or interstate commerce. On one very important issue the Circuit Court reached the same conclusion as that reached by the District Court: *There is no conflict between the California overtime law and federal admiralty law.*

In dissent, District Judge William P. Copple (sitting by designation) concluded that since admiralty law has no requirement that a maritime worker receive overtime pay, absent an express clause in the employment agreement maritime workers are not entitled to recover overtime wages

pursuant to statute[16]. (Appendix, pages A-40—A-41) Additionally, Judge Copple agreed with the District Court's conclusion that since "in light of the obvious conflict between California's overtime compensation provision and the FLSA, the FLSA preempts California's provision." (Appendix, page A-44)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

EXERCISE OF THE STATE'S POLICE POWER TO REGULATE THE OVERTIME COMPENSATION OF THE WORKERS INVOLVED IN THIS CASE IS NOT PREEMPTED BY ADMIRALTY LAW

A. The Ninth Circuit's Decision Expressly Limits Its Application To Workers Who Are California Residents Not Engaged In Foreign, Intercoastal, Or Coastwise Voyages Whose Predominate Work-site Is In the Territorial Waters Or On The High Seas Off The California Coast.

In the Ninth Circuit's discussion of the jurisdiction and scope of relief, the court reviewed at some length the District Court's opinion. (Appendix at pages A-8—A-11) The Ninth Circuit determined that despite the fact that PMSA and TIDEWATER sought a ruling which would cover all employees of its members with respect to a broad range of

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[16]This conclusion completely overlooks the fact that not all *maritime* workers are exempt from the overtime requirements of the FLSA. Only "seamen" are expressly exempt. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).

California Labor Code provisions, the District Court had limited that relief to cover only:

> "...application of California's overtime pay laws to (1) FLSA-exempt seamen working within the territorial zone or on the high seas; and (2) maritime employees working primarily on vessels on the high seas that are not engaged in foreign, intercoastal, or coastwise voyages."

The Circuit Court explained that the District Court, had applied the constitutional rule set out in *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) which requires that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining injury as a result of the statute's operation or enforcement" in denying the request of PMSA and TIDEWATER to increase the scope of the relief.

In view of Petitioners unrelenting attempts to expand the scope of relief to be decided, the Circuit Court observed in Footnote 5, (Appendix, at pages A-9—A-10) that "the overall thrust of the district court's analysis strongly suggests that the discussion was limited to employees like those who brought claims in the underlying state administrative action" as described above. Moreover, the court expressly limited the scope of its opinion to those employees described and discussed by the district court.

Despite the limitations placed on the jurisdiction of the Labor Commissioner by both the District Court and the Circuit Court, neither PMSA nor TIDEWATER appealed the District Court's limitations which the Circuit Court adopted. Yet, both PMSA and TIDEWATER now argue that the ramifications of the ruling of the Ninth Circuit containing the same limitations as the ruling of the District Court, will

impact on a wide range of employments within admiralty jurisdiction.

The Ninth Circuit's discussion of the scope of relief was significant to its determination that, within the stated limits, the declaratory relief met the Constitutional case or controversy requirement. Thus, as stated and painstakingly—yet expressly—qualified by both the District Court and the Ninth Circuit, the *factual* scenario upon which the legal analysis necessary to determine the jurisdiction of the State of California must be based is limited to the circumstances surrounding the specific class of workers described by the two lower courts.[17]

Nonetheless, both Petitioners in their briefs before this Honorable Court attempt to paint a picture of economic doom, confusion and uncertainty, and impermissible interference with the uniformity of admiralty law brought about as a result of the State of California applying its law. The Petitioners *anticipate* that California will apply its law to workers who are simply "based" in California or are "residents" of the state without regard to whether the workers are employed *exclusively* in waters off the California coast on vessels which are not engaged in foreign, intercoastal, or coastwise voyages. Simply *anticipating* a problem does not create a case or controversy and such *anticipation*, absent a

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[17]Obviously, the statement of a Deputy Labor Commissioner (a non-lawyer referred to by Petitioner PMSA as "Respondent's designated policy expert", see Petition of PMSA, fn, 4, pages 5—6) that he "thinks" the Labor Commissioner has jurisdiction over non-California residents whose work situs is a vessel located outside the State of California is not entitled to a great deal of weight in view of the limits placed on the jurisdiction by both the District and Circuit Courts in the circumstances at issue here. Such would be the case even if those statements accurately depicted the position of the Labor Commissioner.

realistic danger, cannot be used as a vehicle to grant declaratory or injunctive relief. *Babbit v. United Farm Workers Nat'l Union, supra,* 442 U.S. 289 at 298. By expanding the facts Petitioners hope to elicit an advisory opinion from this Honorable Court.

In view of the fact that the limitations on the jurisdiction of the Labor Commissioner had been determined by the District Court and no appeal of that limitation was taken by the Petitioners, it is inappropriate for the issues to be raised in this court. Petitioners' "anticipated problems" are, thus, better left for the day, if *or* when it arrives, that such factual scenarios as those painted by the Petitioners are, in fact, at issue in a case. At that time the issues Petitioners raise could be presented to the federal courts to be determined within the case or controversy requirements of the United States Constitution.

B. The Ninth Circuit's Preemption Analysis Does Not Conflict With Principles Of Federal Admiralty Jurisdiction.

1. The Preemption Standard

The Ninth Circuit, in addressing the preemption question stated "we start with the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless there was a clear and manifest purpose of Congress." [Citations]. (Appendix, A-11)

Petitioner Tidewater criticizes the Ninth Circuit's preemption analysis as "an unusually rigorous preemption standard" (TIDEWATER Petition, p. 12) and "completely foreign to maritime law and entirely at odds with the constitutional requirement for federal uniformity" (Id. p. 18). This contention, however, completely ignores the fact that the

same test was applied in *Ray v. Atlantic Richfield Co.* 435 U.S. 148, 156 (1978) as the standard for challenging a state's police powers under the doctrine of federal preemption in the admiralty area. As this Honorable Court said in *Askew v. American Waterways Operators, Inc.* 411 U.S. 325, 339 (1973): it is a long-established principle that "...a state, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs provided that the state action does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." (quoting Mr. Chief Justice Hughes in *Just v. Chambers* 312 U.S. 383 at 388 (1941))

2. The States Are Not Completely Precluded From Legislating On The "High Seas"

Justice Stewart (with whom Justice Rehnquist joined in dissent) responded to contentions of the petitioners in *Oil, Chemical & Atomic Workers, Etc. v. Mobil Oil*, 426 U.S. 407 (1976), that implementation of Texas' right-to-work law to employees employed on the high seas would constitute an intrusion into that "exclusive" federal enclave:

> "To refute the notion that the high seas are a species of federal enclave, it is sufficient to point out that the Court has found state legislation pre-empted *only* when the nature of the problem required the application of a uniform rule or when the state law unduly hampered maritime commerce.
>
> ...

> "The Court has never struck down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean "territory." 426 U.S. at 435-436

In summary, the exercise of a state's traditional police powers in the admiralty area is permissible absent a clear conflict with a Federal statute or when the state statute directly interferes with the necessary uniformity of admiralty law. Such standard gives due regard to the powers which are specifically reserved to the states under the 10th Amendment of the U.S. Constitution.

3. California's Overtime Requirement Does Not In Any Way Contravene An Act of Congress

Both the District Court and the Circuit Court determined that "Maritime statutes simply do not purport to govern the overtime wages of employees such as those in this action." (Appendix, page A-12)

The Circuit Court noted that while the Shipping Act (46 U.S.C. §§ 10301-10908) does govern some maritime employees' wages, hours and working conditions, those provisions do not apply to the employees involved in this appeal because the Shipping Act provisions only cover vessels engaged in foreign, intercoastal, or coastwise voyages. The workers involved in this case do not fall under any of the above categories of voyages. The vessels employing these workers were moored in port, stayed on the high seas surrounding the oil rigs or *voyaged* between one port and the oil rigs. (Appendix, pages A-5 and A-7)

While the District Court held that the FLSA preempted California overtime pay laws, the Circuit Court pointed out that Congress has never expressly prohibited states from

applying their overtime laws to seamen and neither PMSA nor TIDEWATER could point to anything in the legislative history of the FLSA to suggest that Congress intended to preclude application of state overtime provisions to seamen.

4. The Exemption Of Certain Categories Of Workers In The FLSA Does Not Evidence An Intent By Congress That The States Are Precluded From Covering Them

Petitioner TIDEWATER states that the Ninth Circuit ignores the concept of "negative preemption" as described in *Ray v. Atlantic Richfield Co.* 435 U.S. 151, 178 (1978), (TIDEWATER Petition, page 19) TIDEWATER contends that "Congress has expressly declared in Section 13(b)(6) of the FLSA that seamen should be exempt from...maximum hour and overtime standards." Thus, TIDEWATER concludes, the holding in *Ray v. Atlantic Richfield Co.* must apply here to preclude the state from enforcing its overtime regulations.

The concept of "negative preemption" was described in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926). There this Honorable Court initially restated the proposition that "the intention of Congress to exclude states from exerting their police power must be clearly manifest." *Napier, supra,* at 611. In addressing preemption, concluded Justice Brandeis, the question must be: "Does the legislation of Congress manifest the intention to occupy the entire field?" When this Court applied that test in *Ray v. Atlantic Richfield Co., supra*, it looked to the "statutory pattern" to determine the congressional intent. From the review conducted in *Ray* it was clear that Congress' intent in regard to the Tanker Law was that "it desired someone with an overview of all the

possible ramifications of the regulation of oil tankers to promulgate limitations on tanker size and that he should act only after balancing all of the competing interests."

Applying that same test to the facts in this case, however, leads to the inescapable conclusion that in view of the *express* intent of Congress set out in Section 18(a) of the Fair Labor Standards Act, Congress intended that the purpose of the FLSA was, as the Circuit Court described it, "to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." (Appendix, p. A-33) To reach any other conclusion would make a mockery of the savings clause.

The consequences of reaching a conclusion to the effect that Congress' exemption of seamen from the overtime requirements of the FLSA must lead to the inference that Congress has precluded the states from adopting overtime requirements which would cover seamen, would be illogical. Congress has exempted such categories of workers as those employed on small newspapers from even the minimum wage (29 U.S.C. 213(a)(8)). In addition, such diverse categories as announcers on radio and television stations located in small towns (29 U.S.C. 213(b)(9)); salesmen, partsmen and mechanics engaged in selling or servicing automobiles, trucks, or farm implements (29 U.S.C. 213(b)(10)(A)), and domestic servants (29 U.S.C. 213(b)(21)) have been exempted from the overtime requirements of the FLSA. There is no logic which would support the conclusion that because Congress has expressly exempted these workers the inference arises that the lawmakers also intended to preclude the states from requiring that those workers receive the state-mandated minimum wage or overtime premium. None of the above workers fall into categories which are heavily regulated by

federal law. There exists no federal law or regulations which cover such occupations as pressmen or printers on small newspapers, used car salesmen or partsmen in an auto dealership, or domestic servants. Yet, if the argument presented by Petitioners is to have any rationale these categories of workers, now exempt from either the minimum wage or overtime provisions of the FLSA, would also be exempt from the state minimum requirements.

The mere recitation of the logical consequences of Petitioners' argument, of course, signals the extreme tenuousness of the contention.

5. The "General Principles" Of Admiralty Law Cited By PMSA In Regard To "Overtime" Deal With The "Type" Of Work, Not The "Hours" Of Work

Petitioner PMSA maintains that under general maritime law, workers and their employers are free to determine pursuant to agreement, the wages, hours, and working conditions under which the workers will be employed. (PMSA Petition, page 11) There is, as Petitioner correctly points out, no "implied right to overtime". This same rule applies to all employment and is not unique to the admiralty area.

As with any law applied to employment, admiralty courts have recognized a right[18] to fair compensation for work performed. (PMSA Petition, page 6) But Petitioner over-

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[18]The admiralty courts have applied the Biblical admonition that the "laborer is worthy of his hire" to remedy outrageous situations where the "seaman" has been asked to perform duties outside of the contract of employment as evidenced by the shipping articles. *The Lackme*, 93 F. 230 at 232.

states the case when it concludes that the admiralty law recognizes an *absolute* right to fair compensation for "overtime" performed. The cases which are cited by PMSA in support of its statement do not refer to "overtime" in its classical sense[19], these courts have simply found that "when seamen are required or induced by the master to do extra work in handling cargo, in port, for the mere advantage of the owners or charterers, such extra work is outside of the terms of the contract contained in the shipping articles, and in all such cases the law recognizes the *scriptural* rule that the laborer is worthy of his hire." *The Lakme*, 93 F. 230 at 232 (D.Wash.1899). (Emphasis added)

The fair compensation for the "overtime" in each of the cases cited by Petitioners involved an interpretation of the contract of employment. Admiralty law confers no "absolute" right to recovery for overtime; the Courts have simply recognized that you can't hire seamen, pay them seamen's wages, and expect them to perform longshoremen's work in addition to their other duties. The cases cited by Petitioners do nothing more than confirm that well-established rule.

In fact, Admiralty law never addresses the question of whether a seaman is entitled to "overtime" for hours worked in excess of a standard number of hours. Yet, from the fact that there exists no right to "overtime" under admiralty law, Petitioners ask that the Court conclude that a statutory obligation to pay overtime can not arise because such a requirement would interfere with the uniform and harmonious system of national maritime law. But again, as with the other arguments raised by the Petitioners, they fail to

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[19]These cases limit generally the type of work the "seaman" is expected to perform; not the hours he is expected to toil as limited by both the FLSA and state law.

point to any authority which would support their theory that a state law affecting only workers employed *exclusively* off the coast of California with no contacts with any other state or nation, would impact on the uniform and harmonious system of maritime law.

6. The Effect Of *Jensen* And Its Progeny

Petitioners state in general terms that the standard applied by the Ninth Circuit was plainly inconsistent with *Southern Pacific v. Jensen*, 244 U.S. 205 (1917), and its progeny. (TIDEWATER Petition, page 17) But, as correctly quoted by Petitioner, the *Jensen* and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), cases discuss uniformity of maritime matters in terms of preserving "freedom of *navigation between the states and with foreign countries.*" See *Jensen*, 244 U.S. at 217. Thus, any direct application of *Jensen* to preclude, *ipso facto*, the exercise of the state's police power to regulate and protect workers whose only contact is with the State of California and who work exclusively off the California coast is severely misplaced.

The concern of this Court in the *Jensen* and *Knickerbocker* cases was the effect the state law could have on shippers whose vessels traveled not only from state to state but in interstate commerce as well. The law should not depend, where numerous jurisdictions are involved, upon the fortuitous location of the vessel at the time of an injury.

And, of course, while expressing the belief that *Jensen* has continuing force, the Circuit Court pointed out, "the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict*

with federal law or *interfere* with the *uniform working* of the maritime legal system."

Moreover, this Honorable Court has characterized the need for "uniformity" of maritime matters in the face of a state's exercise of its police powers by stating that "the Constitution presupposes a body of maritime law, that this law, as a matter of *interstate and international concern*, requires harmony in its administration ..." *Askew, supra*, 411 U.S. at 339, quoting *Just v. Chambers, supra*, 312 U.S. 383. Thus, at best, the federal uniformity argument is most compelling in interstate and foreign navigation and is obviously applicable in areas where Congress has specifically legislated; but certainly uniformity and harmony isn't *automatically* applicable in areas of otherwise local[20] concern where Congress has chosen not to act.

The cases cited by TIDEWATER in its Petition at page 22 do little to support Petitioner's contentions. In both *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919) and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) this Court

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[20]As Prof. Currie explained in his treatise, *Federalism and the Admiralty: "The Devil's Own Mess,"* S.Ct. Rev. 158, at 171 (1960): "In ascertaining the interest of a state in the maritime application of its laws, profitable use can be made of enlightened theories of conflict of laws. The first step should be determination of the policies which are sought to be furthered by the state law in question...The second step should be an examination of such connecting factors as the place where the events giving rise to suit occurred, and the place of residence of the parties, in order to decide whether the matter has such an impact on the economy and affairs of a particular state as to give it a legitimate concern for the application of its laws. If the connection of the state with the matter in suit is such as to give it a legitimate concern for the advancement of the policy expressed in the law asserted to be applied, that state has an interest in the outcome of the litigation which is entitled to respect."

took pains to explain that the contracts at issue were intended to be performed all over the world.[21]

The Circuit Court distinguished the case of *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Co.*, 426 U.S. 407 (1976), from the facts in the instant case by noting that the workers involved in *Mobil* were residents of a number of different states and all were employed on vessels that voyaged regularly from Texas to New York or Rhode Island and back. The practical problems present in *Mobil* are not present in this case.

Also, of course, the final consideration in *Mobil* was whether "job situs" or "sufficient contacts" were the factors to be applied to determine whether the Texas right-to-work law should apply to the affected workers. This Court did not rely upon concepts of admiralty law in reaching its decision, concluding instead that "[i]t is therefore fully consistent with *national labor policy* [under the National Labor Relations Act] to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply." (426 U.S. 420-421) (Emphasis added)

The case of *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), involved the question of whether a state law may be used to supplement the measure of recovery provided by the Death on the High Seas Act (DOHSA), a federal statute which impacts directly on the maritime industry.

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[21]For instance, in *Union Fish v. Erickson*, 248 U.S. 308, this Court noted that "[I]n entering into this contract the parties contemplated no services in California." The Court further noted that maritime law would always cover the conduct of "those who pursue commerce and put to sea." *Id.* at 313. The workers involved here are not engaged in commerce between the states or with foreign nations.

The Court in *Tallentire* considered "the legislative history ...the Congressional purposes underlying the Act, and the importance of uniformity of admiralty law" in reaching the conclusion that the language of the federal statute was intended only to serve as a jurisdictional savings clause.

It is respectfully submitted that no rational interpretation of the clear language of 29 U.S.C. §218(a) could lead to any other conclusion than that Congress intended to leave to the states the power to impose wage and hour requirements with minimum wages higher than those imposed by the Act and/or a maximum workweek shorter than that imposed by the Act. Congress has clearly spoken in this regard, and thus, *Tallentire* has absolutely no useful application to this case.

C. Petitioner's Proposed Construction Of The Savings Clause Contained At Section 18(a) of the Fair Labor Standards Act As An Unconstitutional Delegation of Maritime Powers To The States Is Flawed When Considered In Light Of The Legislative and Judicial History Of The Act

1. The FLSA Neither "Delegates" Any Legislative Authority To The States Nor Precludes The States From Applying Its Overtime Requirements To Its Residents.

Petitioner PMSA argues that the FLSA savings clause has been construed to permit state legislatures, in regulating land-based employment, to enact higher minimum wage rates and lower maximum workweek standards than those set forth

in the FLSA (PMSA Petition, p. 18)[22] Petitioner's argument then proceeds to conclude that since Congress may not delegate its legislative authority over maritime matters to the states under *Knickerbocker Ice Co. v. Stewart, supra,* allowing the States authority to regulate maritime employment pursuant to the FLSA savings clause would be an unconstitutional delegation of legislative authority over maritime employment to the states. In the *Knickerbocker Ice Co.* case this Court struck down a federal statute that granted states authority to apply state workers compensation laws to maritime employers as a delegation beyond the power of Congress.

The Petitioner's argument is severely flawed for two reasons: Initially, the question presented in *Knickerbocker* has not been reexamined by this Court and at least one highly regarded commentator states that *Knickerbocker* and the later case of *Washington v. W. C. Dawson* 264 U.S. 219 (1924) will be treated as aberrations.[23] Mr. Justice Black in response to a suggestion that a state law dealing with marine insurance would be invalid even where Congress has expressly or implied consented to state regulation noted that "[T]his contention is so lacking in merit that it need not be discussed." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321 fn. 29 (1955)

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[22]It must be noted that PMSA draws a heretofore unknown distinction between "land based" and "maritime" employment under the FLSA. Such a distinction is found nowhere in the FLSA. The FLSA merely exempts "seamen" from overtime coverage (29 U.S.C. §213(b)(6)). The term "seamen" has been specifically defined by the Secretary of Labor (29 C.F.R. §§ 783.31 et seq.) and clearly that definition does not exempt all other maritime workers.

[23]*Federalism and the Admiralty: "The Devil's Own Mess," supra,* S.Ct. Rev. 158, at 191 (1960)

In addition, the reasoning presumes that the State's power is necessarily coextensive with the FLSA contrary to the language stated in the FLSA's Savings Clause. By extension of their argument, Petitioner would maintain that, prior to the FLSA, California had absolutely no interest in protecting its local residents who worked locally off its shores on the high seas (and not otherwise engaging in maritime commerce via foreign, intercoastal, or coastwise voyages).

As previously discussed, however, the express exemption of seamen from coverage under the FLSA cannot logically be read to preclude exercise of the state's police powers in areas of historical and traditional coverage under state laws. Similarly, any examination of the FLSA, its savings clause, and the legislative history of the Act reveals that the savings provision does not "delegate" any congressional powers to the states. Nothing in the Legislative history of the FLSA even suggests or supports a Congressional intent to delegate any new or expanded powers to the States as was done and invalidated in *Knickerbocker*. Accordingly, The Ninth Circuit correctly found that:

> "California's actions in this case represent an exercise of traditional police powers firmly in place before Congress enacted the FLSA. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 393 (1937) ("In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. Thus, Congress did not 'delegate' authority to the states through section 218, but simply made clear its intent not to disturb the traditional

> exercise of the states' police powers with respect to wages and hours more generous than the federal standards. We cannot read Section 218 as a delegation, and, therefore, conclude that *Knickerbocker Ice* does not control this case." (Appendix at A-24—A25)[24]

Petitioner, thus, improperly suggests a novel but unfounded "but for" relationship between the federal FLSA and the state's inherent independent authority to exercise its traditional police powers over regulation of employment for its residents. This "but for" relationship theory disregards the express language contained in the FLSA's Savings Clause and significantly modifies historic principles of sovereignty between the federal and state governments. The Petitioner's argument is simply unsupported by reason or law.

2. The *Mobil Oil* and *Tallentire* Cases Do Not Require Preemption Of The State Law Under The FLSA Savings Clause In This Action

Notwithstanding the conceptual and logical infirmities of the basic argument to construe the Savings Clause as an unconstitutional delegation of maritime authority to California, Petitioner PMSA relies, as did the District Court, upon two more recent cases construing savings provisions contained in other federal laws regulating maritime matters on the high seas. (PMSA Petition, p. 20)

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[24]Petitioner's statement that the Circuit Court "agreed" with the District Court that a finding of preemption in this case would be automatic were it not for the FLSA's savings provision (PMSA Petition, p. 18) is not only an overstatement of the law; this conclusion is certainly at odds with the Circuit Court's finding as quoted above.

As discussed, *supra*, in *Oil, Chemical & Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407 (1976) and *Offshore Logistics, Inc, v. Tallentire*, 477 U.S. 207 (1986), this Court interpreted savings clauses in federal statutes (National Labor Relations Act and Death On the High Seas Act, respectively). However, as the Circuit Court properly observed, this Honorable Court construed the savings clauses by applying rules of statutory construction which considered the purposes of the enactments and the clear legislative history of the legislation. This review required restricted interpretations of the savings clauses in issue. This Court noted clear conflicts between the state and federal statutes in those cases, unlike the state and federal laws at issue in the instant case. Given the express language in FLSA Section 18(a) coupled with the announced purpose and the legislative history of the FLSA, a suggestion that it was the Congressional intent to preclude states from applying more protective overtime laws to local maritime workers working in the waters directly off the California coast who are not engaged in foreign, intercoastal, or coastwise maritime commerce is simply absurd.

CONCLUSION

The factual circumstances in this case limit the State's jurisdiction to enforce its overtime pay laws to workers who are California residents employed exclusively in waters off the California coast on vessels which are not engaged in foreign, intercoastal, or coastwise voyages. The workers have no contact with any state other than California and the work they perform has no direct impact on interstate commerce.

Given the factual scenario, there is no interference with the necessary uniformity in admiralty law. The states are not

incompetent to legislate over matters of historical local interest which happen to arise on the high seas; nor is there any federal law, express or implied, covering maritime workers such as those described here, with which the state overtime wage laws would conflict.

Congress did not "delegate" authority to the states through the Fair Labor Standards "savings clause", the states enjoyed a wide field of discretion in dealing with the relation of employer and employed before Congress adopted the FLSA. The language of section 218(a) of the FLSA simply clarified the intent of Congress not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standard.

Given the narrow factual situation, the application of the law to those facts by the Ninth Circuit, and the lack of any established conflict among the circuits, review by this Honorable Court is not necessary.

Respectfully submitted,

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No. 91-142

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

TIDEWATER MARINE SERVICES, INC. and WESTERN BOAT OPERATORS, INC.,

Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, and DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-142

TIDEWATER MARINE SERVICES, INC. and WESTERN BOAT OPERATORS, INC.,

Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, and DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an amicus curiae brief in support of the Petition for Writ of Certiorari filed by Tidewater Marine Services, Inc., and Western Boat Operators, Inc. (collectively "Petitioners"). Petitioners have given consent to the MLA to file an amicus brief, but Respondents have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2.

II

NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. The MLA is a nationwide bar association founded in 1899. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests - shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations. (Emphasis added).

In furtherance of these objectives, the MLA has, during its ninety-one years of existence, sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The MLA

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[1]46 U.S.C. §§ 1300-1315.

has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

The MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its commissions on trade law ("UNCITRAL") and trade and development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

The MLA has actively participated, as one of some forty-nine national maritime law associations constituting the Comite Maritime International,[4] in the movement to achieve maximum

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[2]9 U.S.C. §§ 1-15.

[3]E.g., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention For Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, reprinted in 6 M.M. Cohen, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), see 33 C.F.R. ch. 1, subch. D., Special Note at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[4]These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

international uniformity in maritime law through the medium of international conventions.[5]

The MLA believes that uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by the MLA's membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of United States Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, worldwide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has since been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

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[5]E.g., Assistance and Salvage (1910), 37 Stat. 1658 (1913), reprinted in 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, reprinted in 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), reprinted in 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), reprinted in 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), reprinted in 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, reprinted in 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), reprinted in 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

[6]MLA Minutes, MLA Doc. No. 558 at 6397-98 (1975).

[7]MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

V

In furtherance of its uniformity policy and resolutions, the MLA has filed amicus briefs in a number of cases, including briefs accepted by this Court.[8] However, it is the policy of the MLA to participate as amicus curiae only when important issues of maritime law are involved and the impact of the Court's decision may be substantial. In one of those cases, Offshore Logistics, Inc. v. Tallentire[9], the Court noted the role of the MLA. Tallentire involved the issue of whether Section 7 of the Death on the High Seas Act (DOHSA), 46 U.S.C. § 767, which provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected," was intended to preserve the applicability of state wrongful death statutes on the high seas. The Court stated that:[10]

> The Maritime Law Association ("MLA"), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA. The MLA envisioned Section 7 to be a jurisdictional savings clause . . . the MLA, an expert body of maritime lawyers, had reason to fear that absent a savings clause specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts.

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[8]Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

[9]Id.

[10]477 U.S. at 223-224.

The Court in Tallentire agreed with the MLA that Section 7 is a jurisdictional savings clause rather than a congressional endorsement for application of state wrongful death statutes, and held that state statutes are preempted where DOHSA applies.[11]

The present case, like Tallentire, presents an important issue on which the decision of this Court could have a substantial impact upon the uniformity of maritime law. The employees in this case were seamen employed on the high seas and in coastal waters. Consequently, the uniformity of maritime law is gravely threatened by the Ninth Circuit's holding that they are entitled to overtime compensation under California state law.

The conditions of maritime employment are not comparable to those of land-based employment, where it is much more feasible for workers to be employed in standard eight-hour shifts. If individual states are permitted to apply their overtime compensation laws to seamen on vessels in navigation, significant harmful consequences would result to the MLA's membership and the wide variety of interests which it represents. The costs to maritime employers could become so great as to make it difficult for them to continue in operation. Such consequences can be seen in the present case, in which the salaries of certain crewmembers were tripled by virtue of the Ninth Circuit's decision. Moreover, compensation laws might differ from state to state, and the laws of one state might well be incompatible with those of other states purporting to regulate the same vessels. The danger of conflicting state regulation is especially pronounced in maritime commerce, because vessels typically operate on navigable waterways which border on several states. In addition to imposing ruinous labor and administrative costs, the application of differing state compensation laws would expose maritime employers to conflicting standards and produce arbitrary and inequitable differences in the treatment of

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[11]477 U.S. at 231-32.

their employees. It would also interfere with the ability of the Coast Guard to regulate the manning of vessels on a uniform national basis, and with the ability of seamen's unions to represent their members on a uniform national basis. Finally, cost barriers resulting from differences in state compensation laws would impede the free flow of maritime commerce between the states. Accordingly, the MLA urges that this motion be granted.

THE MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

The MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, is necessarily different from that of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. The MLA can comment objectively about the need for review by this Court in order to insure national uniformity on the issues presented. The MLA will concentrate only on the need for uniformity in maritime actions regardless of the forum, and on the dangers of permitting the decision of the Ninth Circuit Court of Appeals to stand.

DATED August 8, 1991.

RESPECTFULLY SUBMITTED:

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In The

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as amicus curiae in support of the Petition for Certiorari by Tidewater Marine Services, Inc. and Western Boat Operators, Inc. ("Petitioners").

QUESTION OF LAW PRESENTED

Whether state overtime compensation statutes can apply to seamen employed on vessels in maritime commerce.

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this brief.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The employees in this case were seamen employed on the high seas and the navigable waters of the United States. If California were permitted to apply its overtime compensation laws, then other states would likewise be free to regulate the wages of seamen in maritime commerce. Although the present case involves overtime, there is no reason why the application of state law would be so limited. The result would be that seamen's wage claims could vary significantly from state to state.

When a conflict arises between the application of state law and the uniformity of maritime law, the Constitution requires that consideration must be given to the need for uniformity in relation to the benefits sought by the states from the application of their laws. When it comes to seamen's wages, the need for uniformity is overwhelming. The states would derive little benefit from application of their laws, because seamen comprise only a small fraction of the work force. The goals of the state wage and hour laws would still be met if seamen were excluded from their reach. On the other hand, the maritime industry would be severely harmed if states were permitted to regulate seamen's wage claims. The interests of the states would also be harmed, because the economic barriers resulting from diverse state laws would hinder the flow of maritime commerce. Thus, the Constitutional mandate of uniformity forbids the application of the California overtime laws. There is specific and unambiguous federal maritime case law

rejecting the application of state law in circumstances analogous to those of the present case.

If the wages of seamen were in need of protection, it would be up to Congress rather than the states to supply the necessary legislation. In fact, seamen's wages are among the most highly protected bodies of rights in all of maritime law. They are governed by extensive and stringent federal statutes dating back more than two hundred years. The extensive regulation of seamen's wages by Congress forecloses additional remedies under state law.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF CALIFORNIA OVERTIME COMPENSATION LAWS TO MARITIME EMPLOYEES VIOLATES THE CONSTITUTIONAL MANDATE OF UNIFORMITY.

A. CONTRACTS BETWEEN SEAMEN AND THEIR EMPLOYERS SHOULD BE ENFORCED UNIFORMLY THROUGHOUT THE UNITED STATES REGARDLESS OF WHERE THE CONTRACT IS MADE OR THE WORK IS PERFORMED.

In Kossick v. United Fruit Company, 365 U.S. 731, 81 S. Ct. 886 (1961), reh. denied, 366 U.S. 941, 81 S. Ct. 1657 (1961), an injured seaman sued his employer to recover for improper treatment at a Public Health Service hospital. The seaman contended that the shipowner had agreed orally to remain responsible for the hospital's treatment. The Supreme Court ruled that maritime law should have been applied, instead of the New York statute of frauds, because the application of state law would undermine the mandate of uniformity. The court reasoned that:

> [T]his is such a contract as may well have been made anywhere in the world, and . . . the validity of it should

be judged by one law wherever it was made. 365 U.S. at 741 (citations omitted).

It is equally true that the contracts of seamen employed in a particular jurisdiction need not have been made in that jurisdiction. Seamen are frequently hired in one state for work in another state or throughout the United States. For example, Petitioner Tidewater is headquartered in Louisiana and employs seamen throughout the United States. The seamen's wages should be governed by the same laws regardless of where their contracts are made or the work is performed.

The MLA does not contend that every maritime interest, no matter how slight or marginal, should displace every local interest, no matter how pressing. The Supreme Court stated in Kossick that state and maritime interests must both be considered in determining whether a state statute should be preempted by the need for uniformity. 365 U.S. at 739, 741-42. In the present case, the application of state overtime compensation laws to seamen would be extremely harmful to the maritime industry. The benefit to the states would be only marginal, because maritime employees comprise a very small portion of the work force to which the state overtime compensation laws are directed. Moreover, the application of state overtime compensation laws would harm the states by creating economic barriers to the free flow of maritime commerce. Consequently, the analysis employed in Kossick points to an accommodation favoring uniformity. The decision of the Ninth Circuit Court of Appeals must be reversed.

B. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS WOULD BE EXTREMELY DETRIMENTAL TO MARITIME COMMERCE.

State overtime laws can be of tremendous significance in maritime commerce, where working conditions differ significantly from the land-based working conditions for which state wage and hour laws are designed. In particular, the realities of shipboard

employment make it impossible in many instances to schedule seamen according to standard eight-hour shifts.

The fundamental differences between maritime and land-based employment are reflected in the Shipping Act and Coast Guard Certificates of Inspection for offshore vessels, which set a maximum work period of twelve hours per day on crew and supply boats such as those operated by Petitioners. Reliance upon those federal standards has created an accepted and customary twelve-hour workday throughout the offshore maritime industry. The application of land-based state compensation laws would destroy those customary practices, because it would require maritime employers to pay for substantial portions of their employees' time at premium overtime rates.

In the present case, for example, the California Labor Commissioner awarded $50,000 in overtime pay to a deckhand with a salary of approximately $25,000 per year, thereby tripling his salary. Other employees received comparable increases in compensation. There are few employers in any industry which could afford such drastic fluctuations in their payrolls. The industry as a whole would suffer from the economic dislocations which the Ninth Circuit's decision would produce if allowed to stand.

The Ninth Circuit's decision would also interfere with the ability of the Coast Guard to implement its manning requirements uniformly. The application of differing state laws to crewmembers' compensation would produce significant differences among states as to the cost of complying with those requirements.

Moreover, many seamen are employed under collective bargaining agreements which are intended to apply uniformly throughout the nation. The application of state overtime and other compensation laws to such workers would destroy the uniform

application of the collective bargaining agreements, and interfere with the ability of unions to represent their members nationally.

The decision of the Ninth Circuit was based in part on the majority's conclusion that the need for uniformity is less with respect to vessels that are engaged in local offshore operations. However, it is impossible to distinguish between vessels which work locally and those which travel between different jurisdictions. Almost every vessel in maritime commerce has the potential for interstate operation at any time. Companies like Petitioners are likely to work in several different states. Their vessels and their employees are apt to travel between jobs in different states. Moreover, there are many navigable waterways on which vessels operate routinely among several states. Examples are the Columbia River between Washington and Oregon; the Delaware River between New Jersey, Delaware and Pennsylvania; the Mississippi River, the Gulf of Mexico, the Great Lakes, and Chesapeake Bay, on which vessel operations frequently involve several states; and the Hudson River and New York harbor between New York and New Jersey.

If California can apply its overtime laws to seamen, other states can do so as well. A situation would quickly arise in which seamen would be exposed to fortuitous and inequitable differences in treatment, shipowners would be exposed to enormous expenses and administrative burdens, the courts would be exposed to forum shopping, and irreconcilable conflicts would arise.

The Ninth Circuit's decision emphasizes that the maritime employees involved in this action are California residents. However, it is common for vessels operating on waterways such as the Columbia River, Delaware River or New York Harbor to employ crews comprised of residents from several states. On the Columbia River, for example, the Panel's decision would permit the states of Washington and Oregon to apply their own laws to their own residents. Crewmen who occupy the same rank and do

the same work on the same vessel at the same place and time could then receive substantially different amounts of pay because of differences in state laws. The results would be inequitable and divisive for the crewmen, as well as burdensome and expensive for the shipowners.

Another example is the Pacific Northwest fishing industry, in which it is common for crewmen on a single vessel to come from areas throughout the United States and perform services in Oregon, Washington, Alaska, or all three of those states.

The Ninth Circuit's decision is unrealistic even for companies which are localized in California. For example, Clean Seas Association was a party in the proceedings below. It is involved in the containment and recovery of open ocean oil spills. An oil spill could easily occur near the California-Oregon border. Such a spill would involve residents of California, Oregon and elsewhere, employed by Clean Seas and a variety of other companies. The vessels involved in cleanup and containment would operate in both Oregon and California waters. (The relevance of this scenario is illustrated by the NESTUCCA oil spill in 1988, in which oil contacted beaches all the way from central Washington to northern British Columbia.) Under the Ninth Circuit's decision, both Oregon and California would be entitled to apply their laws to their residents for overtime incurred in their waters. It would be impossible to keep track of which workers were entitled to be compensated under which laws during which periods of time. It would be inequitable for the employers and employees to have compensation depend upon whether a vessel happened to be in Oregon waters, California waters, or on the high seas when the overtime occurred. It would be unfair to limit the employees from other states to base pay when workers from Oregon and California were earning overtime. It would be equally unfair to arbitrarily assign such employees to one state or the other.

The Ninth Circuit's decision would also expose maritime employers to conflicting state standards, because the overtime laws in the states where they operate might not be uniform. For example, a fleet of vessels operating between New York and New Jersey might well hire both New York and New Jersey residents. The New Jersey legislature might make its overtime laws applicable to New Jersey residents, while the New York legislature might make its overtime laws applicable to services performed in New York waters. Moreover, the compensation schemes might vary substantially between the two states, and the statutes of each state might include fines and penalties for non-compliance. The New York employees would be victimized during New Jersey operations, because only the New Jersey residents would be entitled to overtime. The employer would be victimized during New York operations, because it would be subject to conflicting standards. At all times the employer would face the ruinous burden of keeping track of the dates, locations and amounts of overtime for its employees. The same problems would be faced by fleets of tugboats and/or barges operating on the Columbia, Delaware and Mississippi Rivers, hiring employees from two or more states for work in two or more states.

The preceding examples are not exaggerated or unrealistic. They reflect the ordinary, everyday realities of maritime commerce. In order to avoid the problems illustrated by those examples, the Court must reverse the Ninth Circuit's decision and rule that the California overtime laws cannot be applied to seamen.

C. THE NINTH CIRCUIT'S DECISION WOULD ALSO BE HARMFUL TO THE INTERESTS OF THE STATES.

The Ninth Circuit neglected important state interests which weigh against the application of California law. Maritime workers comprise only a small portion of California's work force. The objectives of California's overtime compensation laws would still be met if maritime workers were excluded. On the other hand,

California has a substantial interest in the free flow of maritime commerce among the states. That interest would be frustrated if maritime employment contracts were subject to local wage laws.

For example, the present action includes a Louisiana company performing supply services off the California coast. It also includes an organization created for oil spill cleanup and damage prevention. There are only a few companies with the expertise to provide such services, and they are employed throughout the United States.

These examples illustrate that the expertise and resources needed for maritime operations are not uniformly distributed. It is in the interests of every maritime state to avoid barriers which would hinder the free flow of personnel and materials which the industry requires. Such barriers can be avoided only by adhering to the rule that seamen's employment contracts cannot be modified by diverse local laws.

D. THE LOCALIZED NATURE OF INDIVIDUAL WORKERS' EMPLOYMENT HAS NEVER JUSTIFIED A DEPARTURE FROM THE MANDATE OF UNIFORMITY.

The decision in Southern Pacific Company v. Jensen, 244 U.S. 205, 37 S. Ct. 524 (1916), should control this case. Jensen involved a longshoreman who was killed on a pier in New York City while loading a steamship which operated between New York and Texas. The Supreme Court held that the New York State workers' compensation statute could not constitutionally be applied to longshoremen or other employees engaged in maritime commerce. The Court reasoned that:

> [N]o such legislation is valid if it . . . works material prejudice to the characteristic features of general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations . . . .

* * *

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded . . . . 244 U.S. at 216-17.

There is no exception in Jensen for workers who reside and work solely within the state whose laws are at issue. In fact, the work of longshoremen such as Jensen is typically limited to the locations in which they reside. Their employment is every bit as localized as that of the workers in the present case. Moreover, the operations of companies such as Petitioners are fully as interstate as the operations of Southern Pacific, and the application of state law would impede maritime commerce as much in the present case as in Jensen.

Jensen was followed by Chelentis v. Luckenbach S.S. Co., Inc., 247 U.S. 372, 38 S. Ct. 501 (1918). Chelentis involved a seaman who sued his employer for injuries caused by the master's negligence. In the earlier case of The Osceola, 189 U.S. 158 (1903), the Supreme Court had held that there was no cause of action under maritime law for such injuries. The seaman contended in Chelentis that he was entitled to recover under the common law, rather than maritime law, by virtue of the Savings to Suitors Clause in Section 9 of the Judiciary Act of 1789, 1 Stat. 96. The Savings Clause "saved to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." The Supreme Court held that under the Constitutional mandate of uniformity, the common law was not competent to give a negligence cause of action to seamen. The Court stated that:

> No state has the power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' 247 U.S. at 382 (citations omitted).

Jensen and Chelentis are not alone in holding that localized maritime transactions must be governed by a uniform maritime law. In Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202 (1953), a carpenter employed by a refitting company was injured while working on a ship which his employer had agreed to repair. The carpenter resided and worked in Pennsylvania, where the ship was temporarily berthed. Moreover, shipyards are stationary work sites which employ local residents. Their operations are every bit as localized as the work in the present case, if not more so. The Supreme Court held nevertheless that the carpenter's right of action against the shipowner was governed by the maritime rule of comparative fault rather than the Pennsylvania rule of contributory negligence. The Court stated that:

> True, Hawn was hurt inside Pennsylvania . . . . But he was injured on navigable waters while working on a ship to enable it to complete its loading . . . . Consequently . . . [h]is right of recovery for unseaworthiness and negligence is rooted in federal maritime law. 346 U.S. at 409, 74 S. Ct. at 205.

A similar result was reached in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S. Ct. 406 (1959), in which the guest of a crewman sued the shipowner for injuries received when he fell down a stairway on a vessel in New York City. The guest was not involved with the business of the vessel,

and did not travel with it. The casualty was therefore a purely local incident, except for the fact that it occurred on a vessel berthed at a pier in navigable waters. The state's interest in having its laws applied was every bit as great in Kermarec as in the present case. The Supreme Court held nevertheless that the shipowner's duty to the guest was governed by maritime rather than state law.

In Lloyd v. Goodall, 102 U.S. 541 (1881), the Supreme Court held that federal admiralty law preempted state statutes concerning a vessel which operated exclusively off the coast of California, like the vessels involved in the present case. See also London Co. v. Industrial Commission, 279 U.S. 109 (1929), in which the Court found preemption of state law concerning a casualty which occurred in California coastal waters, and Union Fish Co. v. Erickson, 248 U.S. 308 (1919), which held that the application of California's statute of frauds to a seaman's oral employment contract made within the state was preempted by the need to have a uniform rule for maritime employment contracts.

The foregoing decisions indicate that the mandate of uniformity applies with equal force to seamen and employers who reside or work locally. If seamen's contracts are to be supplemented by compensation laws, the laws must be enacted by Congress and be national in scope. The Supreme Court stated recently that even Congress may be forbidden from supplementing maritime employment contracts by diverse state compensation statutes. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 229, 106 S. Ct. 2485 (1986).

E. THE MANDATE OF UNIFORMITY IS A LONG-STANDING REQUIREMENT THAT PERVADES EVERY ASPECT OF MARITIME EMPLOYMENT.

The all-encompassing nature of the uniformity requirement is illustrated dramatically by the history of seamen's actions for

personal injury and death. Prior to 1920, general maritime law was held to preclude an action for wrongful death. The Harrisburg, 119 U.S. 199, 7 S. Ct. 140 (1886). It was also held to preclude an action by seamen against their employers for negligence. The Osceola, 189 U.S. 158, 23 S. Ct. 483 (1903). Because there was no maritime remedy, state statutes were permitted to supply a remedy for seamen killed in state waters. See, for example, The Tungus v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503 (1959). In 1920, Congress enacted the Jones Act to provide a remedy for seamen injured or killed as a result of their employer's negligence. Once the Jones Act was adopted, the Supreme Court held that state wrongful death statutes could no longer be applied to seamen. Lindgren v. United States, 281 U.S. 38, 50 S. Ct. 207 (1930). Thirty-four years later, in Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S. Ct. 308 (1964), the Supreme Court reaffirmed that because of the mandate of uniformity, state wrongful death statutes cannot apply to seamen covered by the Jones Act. 379 U.S. at 155.

Also in 1920, Congress enacted the Death on the High Seas Act (DOHSA), supra, to provide recovery for wrongful death on the high seas. Once DOHSA was enacted, it was afforded the same treatment as the Jones Act in Lindgren and Gillespie. In Offshore Logistics, Inc. v. Tallentire, supra, the Supreme Court held that DOHSA preempts state wrongful death statutes.

DOHSA permitted recovery for deaths caused by unseaworthiness as well as negligence. However, The Harrisburg continued to preclude recovery for wrongful death under general maritime law. As a result, a number of anomalies existed with respect to seamen who were killed in the course of their employment. For example, death caused by unseaworthiness was actionable if it occurred on the high seas, but frequently not if it occurred in state territorial waters. The Supreme Court therefore overruled The Harrisburg and created a maritime wrongful death action. Moragne v. States

Marine Lines, 398 U.S. 375, 90 S. Ct. 1772 (1970). A principal reason for the decision was to:

> [G]ive effect to the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country. 398 U.S. at 402 (citations omitted).

Now that a wrongful death action has been recognized under general maritime law, it is evolving in the same manner as the Jones Act and DOHSA with regard to uniformity. In Matter of S/S Helena, 529 F.2d 744 (5th Cir. 1976), and Nelson v. United States, 639 F.2d 469 (9th Cir. 1980), it was held that the general maritime cause of action preempts the very state statutes which were theretofore the only remedy for wrongful death in state territorial waters. In Nelson, the Ninth Circuit stated particularly that:

> The need for uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence to the exclusion of state wrongful death statutes. 639 F.2d at 473.

Uniformity is therefore a fundamental imperative which must be given great weight by the courts. When the weight of that imperative is combined with decisions such as Jensen, which holds squarely that state compensation statutes cannot constitutionally be applied to maritime employees, and with consideration of the federal and state interests which would be impaired by the Ninth Circuit's decision, the conclusion becomes inescapable that the Ninth Circuit's decision must be reversed.

II. APPLICATION OF STATE LAW TO SEAMEN'S EMPLOYMENT AGREEMENTS IS PREEMPTED BY EXTENSIVE FEDERAL LEGISLATION.

The decision of the Ninth Circuit was prior to the recent decision in Miles v. Apex Marine Corporation, ___ U.S. ___, 111 S. Ct. 317 (1990). The Supreme Court held in Miles that the

damages recoverable in a general maritime action for the death of a seaman do not include loss of society, and that a general maritime survival action cannot include recovery for the decedent's lost future earnings. The Court's reasoning in Miles applies to the present case. The Court stated that Congress has legislated extensively with respect to the substantive legal protections available to seamen, and:

> We may supplement the statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. 111 S. Ct. at 323 (emphasis added).

Similarly, the Supreme Court stated in Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), that:

> [W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved. . . . States are not permitted to use their police powers to enact such a regulation.

435 U.S. at 178, quoting Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774 (1947). Accord Napier v. Atlantic Coast Line, 272 U.S. 605 (1926); Norfolk & Western Ry. v. Public Utilities Comm., 926 F.2d 567, 570 (6th Cir. 1991). See also Friedell Benedict on Admiralty Section 112, page 7-37, which states that:

> As the Supreme Court has long recognized, the absence of a federal right of recovery may suggest a strong federal interest, and when a state 'supplements' the federal law by adding a cause of action it thereby deprives the defendant of a substantive right to be free of an obligation.

The foregoing authorities indicate that state law is preempted by federal statutes pertaining to seamen's wages. Seamen are among the most carefully protected groups in the maritime industry. See U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351,

91 S. Ct. 409 (1971), which held that Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1986), does not preclude seamen from suing the shipowner for overtime wages and penalty wages under the appropriate sections of the seamen's wage statutes, 46 U.S.C. §§ 10301(b), 10303(e)-(i), 10501(b), 10504(a)-(e), and 2101(12) (West Supp. III 1985). Seamen have been wards of Congress for over 200 years. Arguelles, supra, 400 U.S. at 355. Their rights vis-a-vis their employers have been carefully protected by extensive federal legislation. Subtitle II of 46 U.S.C. is devoted to vessels and their crew. Parts E-G of Subtitle II, 46 U.S.C. § 7101-11501, are dedicated to the manning of vessels, the documentation of seamen, and the rights of seamen under their employment contracts. Those statutes are traceable back to the Act of July 20, 1790. Arguelles, supra, 400 U.S. at 353-54.

The federal seamen's wage statutes have omitted maximum hour and overtime provisions of the kind which California seeks to impose in this case. There can be no question that Congress would have included such provisions if it had wanted to do so. Their omission from the very strict and pervasive seamen's wage statutes must be regarded as a ruling within the meaning of the Miles and Ray decisions that such provisions are inappropriate and therefore disapproved for seamen. This conclusion is bolstered by Section 13(b)(6) of the Fair Labor Standards Act. ("FLSA"), 29 U.S.C. § 213(b)(6). Section 13(b)(6) specifically exempts seamen from land-based maximum hour and overtime standards. The FLSA originally exempted seamen from both minimum wage and overtime provisions. 52 Stat. 1067 § 103(a)(3), c. 676 (1938). In 1961 Congress amended the FLSA to apply the minimum wage to seamen. However, Congress continued to exempt seamen from the maximum hour and overtime provisions. 75 Stat. 71, §§ 9 & 10 (1961). During both legislative sessions, Congress recognized the necessity of exempting seamen from the overtime provisions because of their variable and unscheduled working hours and the

existing regulation of seamen's working conditions by federal maritime agencies. See Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor, 75th Cong., 1st Sess. 544-49 (1937); Hearings on S. 256, S. 879, S. 895 and Bills Amending the FLSA Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 87 Cong., 1st Sess. 376-79 (1961); S. Rep. No. 145, 89th Cong., 1st Sess. 32-33 (1961). See also 29 C.F.R. § 783.0 et seq., discussing the FLSA legislative history.

CONCLUSION

This Court must rule on two grounds that the California overtime compensation laws cannot constitutionally be applied to seamen. The first ground is that the application of California law is contrary to the Constitutional mandate of uniformity. A number of decisions by the United States Supreme Court have forbidden the application of state law to seamen's employment contracts even when the transactions at issue are localized in nature. The second ground is that courts and state legislatures may not supplement the remedies provided by Congress in the federal seamen's wage statutes.

DATED: August 8, 1991.

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No. 91-142

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

TIDEWATER MARINE SERVICE, INC. and WESTERN BOAT OPERATORS, INC.
Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, AND DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

Petitioners Tidewater Marine Service, Inc. and Western Boat Operators, Inc. (collectively "Tidewater") make the following reply to the opposition brief filed by respondent Lloyd W. Aubry, Jr., *et al.* ("Aubry").

I. AUBRY'S REGULATION OF SEAMEN'S MAXIMUM HOURS OF WORK WOULD CAUSE A DIRECT CONFLICT WITH FEDERAL ADMIRALTY LAW

In his opposition brief, Aubry states that his regulation of maritime working conditions would not cause a conflict with federal admiralty law. In particular, Aubry has pointed out that the Fair Labor Standards Act (FLSA) creates exemptions for many categories of workers who are freely regulated by the states, such as employees of small newspapers, radio and television stations, and automobile dealers. According to Aubry, seamen are no different from these other categories of FLSA-exempt workers.

Aubry's argument ignores the fact that seamen are fundamentally different from newspaper workers, television announcers and the other categories of workers who are exempt from coverage under the FLSA. Unlike these other workers, seamen are subject to pervasive and uniform federal regulation of their working conditions, hours of work, compensation and benefits. Indeed, Congress has declared that

> "The Secretary [of Transportation] has general superintendence over the merchant marine of the United States and of merchant marine personnel insofar as the enforcement of this subtitle is concerned, and insofar as those vessels and personnel are not subject, under other law, to the supervision of another official of the United States Government. In the

> interests of marine safety and seamen's welfare, the Secretary shall enforce this subtitle and shall carry out correctly and uniformly administer this subtitle. The Secretary may prescribe regulations to carry out the provisions of this subtitle." 46 U.S.C. § 2103; *see also* 14 U.S.C. § 2.

This broad delegation of authority is unique to the maritime industry. No other commercial industry has an official of the United States government who exercises "general superintendence" over its employees and who is charged with the responsibility to "uniformly administer" federal law to promote their welfare. In accordance with this charge, Congress has given the Secretary of Transportation and Coast Guard broad and detailed jurisdiction over matters such as the documentation of vessels,[1] inspection of vessels,[2] regulation of vessel operations,[3] investigation and regulation of maritime accidents and casualties,[4] licensing and certification of seamen,[5] regulation of protection and relief for seamen,[6] and regulation of manning requirements and maximum hours of work for seamen.[7]

In our opening brief we discussed the Coast Guard's pervasive regulation of maximum hours of

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[1] 46 U.S.C. §§ 12101 - 12308.

[2] *Id.* §§ 3101 - 3318.

[3] *Id.* §§ 3501 - 5116.

[4] *Id.* §§ 6101 - 6307.

[5] *Id.* §§ 7101 - 7705.

[6] *Id.* §§ 10101 - 11507.

[7] *Id.* §§ 8101 - 9307.

work for seamen serving on United States documented vessels such as those operated by Tidewater. Under the authority of 46 U.S.C. Sections 8101 and 8104, the Coast Guard issues Certificates of Inspection which specify the complement of crew and maximum working hours for the specific working conditions under which a vessel is permitted to operate.[8] These Coast Guard regulations are complemented by the seamen's exemption from statutory overtime under the FLSA,[9] and longstanding provisions of federal admiralty law which treat overtime as a matter of contract between master and seaman and guarantee fair compensation for work beyond the period specified by contract.[10]

Together these provisions of federal admiralty law permit uniform regulation of seamen's maximum hours of work and working conditions. Under this federal scheme, the same standards govern seamen's work on a United States documented vessel, whether that vessel is located off the coast of California or anywhere else in the world. And as the Coast Guard officer in charge of the southern California area testified, reliance upon this federal law has created uniform and customary hours of work throughout the offshore maritime industry.[11]

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[8] *See* Tidewater's Petition for Writ of Certiorari, p. 6, n. 7-8, p. 9 & p. 29.

[9] *Id.* pp. 3-5 & pp. 19-20.

[10] *Id.* pp. 5-6.

[11] Declaration of Capt. Robert A. Janecek, USCG (Ret.), at ¶ 11, Appendix to Tidewater's Petition at A-88-89.

Aubry's attempt to prescribe seamen's maximum hours of work would necessarily disrupt this federal system by replacing the "general superintendence" of the Secretary of Transportation and Coast Guard with state land-based working standards that have nothing whatsoever to do with maritime working conditions. For this reason, Aubry's actions conflict with federal admiralty law and violate the principles of maritime uniformity which this Court has recognized in cases such as *Miles* v. *Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 322, 112 L.Ed.2d 275 (1990), and *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

II. AUBRY'S REGULATION OF SEAMEN'S MAXIMUM HOURS OF WORK WOULD HAVE WIDESPREAD EFFECT IN THE MARITIME INDUSTRY

Aubry's opposition brief has argued that his regulation of maritime working conditions would involve only a handful of seamen. He has stated that the only workers who would be affected by his regulations are California residents who work on vessels confined to local waters, and that arguments raised by Tidewater and *amici* Maritime Law Association and American Waterways Operators are based on hypothetical situations. This argument is simply wrong.

In the first place, Aubry took an entirely different position in testimony during the proceedings below. In order to determine the scope of Aubry's regulations, Tidewater took the deposition pursuant to

Federal Rule of Civil Procedure 30(b)(6) of Aubry or his designated representative.[12] Aubry responded by designating his senior deputy,[13] who testified that Aubry would exercise expansive jurisdiction that would include seamen who are non-California residents serving on vessels operating on the high seas beyond state territorial waters.[14] When Aubry tried to reverse course in the trial court in the same manner as he is attempting to do here, the District Court held that Aubry was bound by the testimony of his designated representative. 709 F.Supp. at 1521 & 1522, Appendix to Tidewater's Petition at A-53-54 & 57-58. The record is therefore clear that Aubry's purported jurisdiction over seamen is very broad indeed. That is why his actions have attracted the opposition of so many parties and *amici* from the maritime industry.

Aubry's jurisdiction would have enormous impact in the maritime industry even if it is limited to California residents employed in local waters as he has suggested. As we discussed in our opening brief, California employs more than ten percent of all maritime workers engaged in local offshore operations such as water transportation services, water passenger transportation, water ferries, marine cargo handling, and towing and tugboat services.[15] Aubry's actions would accordingly remove the longstanding seamen's

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[12] 24 CR 22-23.

[13] 24 CR 25-26.

[14] 22 CR 124-28 and 188-89.

[15] *See* discussion of Bureau of Labor Statistics data in Tidewater's Petition for Writ of Certiorari, p. 25.

exemption for more than one out of every ten offshore maritime employees in the United States.

Limiting Aubry's jurisdiction to California residents employed on vessels in California waters would still have widespread effect by causing enormous disruption to offshore maritime operations. As we pointed out in our opening brief[16] and as *amici* Maritime Law Association and American Waterways Operators have echoed,[17] crews commonly reside on their vessels and work for unpredictable periods of time, and crews are commonly composed of seamen who reside in different states. This is true even for offshore operations, such as those in which Tidewater is engaged in California.[18] Aubry's standards would accordingly force seamen to work predictable eight hour work shifts, and they would apply only to California residents while non-resident co-workers on the same vessel would be exempt.

In short, Aubry's land-based regulations completely ignore the realities of maritime trade and would impose enormous and unmanageable burdens.

III. THIS CASE INVOLVES A SUDDEN CHANGE IN PRACTICE BY AUBRY, NOT A LONGSTANDING EXERCISE OF STATE JURISDICTION

Aubry has stated that he has "historically" applied California overtime wage orders to seamen

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[16] *Id.* p. 28.

[17] *Amicus curiae* brief of Maritime Law Association, pp. 6-8; *amicus curiae* brief of American Waterways Operators, pp. 5-6.

[18] 24 CR 1-6.

residing in California, suggesting that he has had a longstanding practice of applying overtime regulations to maritime workers.[19] That is simply not so.

During the trial court proceedings below, Aubry admitted that the California Industrial Welfare Commission has not adopted any regulations or Wage Orders which address the maritime industry or seamen.[20] Aubry also admitted that the decision to extend overtime jurisdiction to seamen and the maritime industry was reached without any public proceedings, written regulations or public pronouncements to affected employers.[21] Aubry's jurisdiction is based on his application of generic, land-based wage orders to maritime employment -- not specific regulations tailored to the maritime industry.

Tidewater has operated vessels in California for nearly 30 years, and it has always scheduled vessel crews according to Coast Guard regulations. No one ever challenged Tidewater's actions until Aubry began accepting jurisdiction over seamen's overtime claims in 1987.

In short, there is nothing "historical" about Aubry's actions in this case. The decision to apply overtime regulations to the maritime industry in California was sudden and unannounced.

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[19] Aubry's Opposition Brief at 2.

[20] 24 CR 19, 38B & 38C.

[21] 24 CR 20-21.

IV. CONCLUSION

For the foregoing reasons, Tidewater's petition for writ of certiorari should be granted.

Respectfully submitted,

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Nos. 91-142 and 91-349

In the Supreme Court of the United States

OCTOBER TERM, 1991

TIDEWATER MARINE SERVICE, INC., ET AL., PETITIONERS

v.

LLOYD W. AUBRY, JR.,
STATE OF CALIFORNIA LABOR COMMISSIONER, ET AL.

PACIFIC MERCHANT SHIPPING ASS'N, ET AL., PETITIONERS

v.

LLOYD W. AUBRY, JR.,
STATE OF CALIFORNIA LABOR COMMISSIONER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act preempts the application of California's overtime compensation laws to certain maritime workers.

2. Whether the application of California's overtime compensation laws to those workers is preempted by the federal law of admiralty, as defined in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), and its progeny.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. This case involves the intersection of admiralty law, state minimum wage laws, and the Fair Labor Standards Act (FLSA). Under Section 7(a) of the FLSA, 29 U.S.C. 207(a), overtime must generally be paid at one-

and-a-half times the regular rate to employees who work more than 40 hours in a given week. Overtime need not be paid, however, to "seamen." Department of Labor regulations define "seamen" as employees who "work primarily as an aid in the operation of [a] vessel as a means of transportation" (29 C.F.R. 783.33) and "perform[] no substantial amount of work of a different character." 29 C.F.R. 783.31. Other maritime employees who work on vessels fall within the broader admiralty definition of "seamen," see *McDermott Int'l Inc.* v. *Wilander*, 111 S. Ct. 807, 817 (1991), but are not exempt from the overtime compensation requirements of the FLSA.[1]

The FLSA does not completely displace state wage and hour laws. The statute includes a savings clause, 29 U.S.C. 218(a), that preserves state laws that provide greater protection to workers. That clause provides, in pertinent part, that "[n]o provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum work week lower than the maximum workweek established under [the FLSA]." 29 U.S.C. 218(a).

2. This controversy arises out of California's effort to enforce its state overtime compensation requirements with respect to a very narrow class of maritime workers who are all California residents serving on vessels that are not engaged in foreign, intercoastal, or coastwise voyages.[2] All of the employees affected work on vessels that do not travel to ports outside of California.

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[1] The lower courts referred to those employees who fall within the FLSA's definition of seamen as "seamen" and to other employees who satisfy the traditional admiralty definition as "maritime employees." Pet. App. A3, A47-A48. We use the same terminology in this brief, but also use the term "maritime workers" to refer to both categories of employees collectively. (Our citations to "Pet. App." refer to the appendix to the petition in No. 91-142.)

[2] As defined by federal statute, "foreign" voyages are voyages between a port in the United States and a port in a foreign country

a. Clean Seas, a petitioner in No. 91-349, operates two vessels, *Mr. Clean II* and *Mr. Clean III*, which control and clean up oil spills and other environmentally hazardous discharges off the California coast. *Mr. Clean II* is moored at Port San Luis Harbor in California, approximately 90% of the time. *Mr. Clean III* conducts containment and clean-up operations four to ten nautical miles off the California coast, and at other times is tied to a buoy approximately seven miles off the California coast.[3] Pet. App. A5. Employees on *Mr. Clean III* are organized into rotating crews that serve seven days on duty followed by seven days off. While on duty, crewmembers work 12-hour shifts, alternating with 12-hour rest periods.[4] *Id.* at A5-A6 & n.3.

b. The petitioners in No. 91-142, Tidewater Marine Service and Western Boat Operators (collectively Tidewater), operate two vessels that transport cargo and passengers between California ports and off-shore oil platforms. Their crews, like those of Clean Seas, work alternating seven-day periods and 12-hour shifts. Pet. App. A6-A7.

c. In 1987, twelve Clean Seas employees filed claims for unpaid overtime compensation with respondent Aubry, the Labor Commissioner of California. Aubry is responsible for enforcing Wage Orders issued by the California Industrial Welfare Commission. Aubry found that the Clean Seas employees were entitled to overtime pay

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other than Mexico, Canada, or the West Indies (46 U.S.C. 10301 (a)(1)); "coastal" voyages are voyages between ports on the Atlantic and Pacific Oceans (46 U.S.C. 10301(a)(2)); and "coastwise" voyages are voyages between a port in one State and a port in another State (except an adjoining State) (46 U.S.C. 10501).

[3] California's territorial waters extend to a line three miles off the State's coast. The high seas lie beyond that line.

[4] The record does not indicate how the employees of *Mr. Clean II* are organized.

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under IWC Wage Order 4-80. The order covers "professional, technical, clerical, mechanical and similar occupations." Pet. App. A7. There does not appear to be any dispute that the order had not previously been applied to maritime workers. The Labor Commissioner nevertheless concluded that the order was applicable, and awarded each employee an average of $45,000 in overtime compensation. *Ibid.*

3. Several trade associations that represent employers in the maritime and oil and gas industries (hereinafter collectively Pacific Merchant)[5] then commenced this action in the United States District Court for the Central District of California, seeking declaratory and injunctive relief against further enforcement of California's overtime pay laws. The complaint alleged, among other things, that those laws are preempted by the FLSA, 29 U.S.C. 201 *et seq.*, and by federal admiralty law. Tidewater intervened in the action after one of its employees filed a claim for $50,000 in unpaid overtime compensation with respondent. Pet. App. A8.

The district court held that the FLSA preempts California's overtime laws as applied to the employees in question. Pet. App. A65.[6] The court reasoned that the FLSA is "a comprehensive, uniform and national system of wage and hour regulation" that "provides maritime employers and employees with a uniform legal standard by which to ascertain their legal rights and obligations." *Id.* at A61. The court added that "common sense sug-

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[5] Those trade associations, Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine Service Association, and Western Oil & Gas Association are petitioners, along with Clean Seas, in No. 91-349.

[6] Portions of the district court's opinion suggest that it may have considered application of state law to employees serving on vessels engaged in coastwise voyages. The court of appeals, however, did not address such employees. Pet. App. A9-A10 & n.5. See also *id.* at A66 n.7 (reserving the question whether maritime employees employed primarily in territorial waters would be subject to state law).

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gests that the uniformity of federal admiralty law would be destroyed if the states were permitted to 'add on' to the federal law enacted by Congress." *Id.* at A62.

4. A divided court of appeals reversed. Pet. App. A1-A44. The court declined to resolve issues of state law raised by the parties, but held that application of the California wage and hour laws in issue was not preempted by the FLSA or by federal admiralty law.[7]

a. Petitioners urged the court of appeals to find that Aubry had failed "to comply with state administrative and procedural requirements regarding wage and hour rulemaking and law enforcement." Pet. App. A32. The court declined to resolve these issues, emphasizing that "we are *not* deciding here whether Aubry's actions are valid *as a matter of California administrative and labor law*. Our task is to determine only whether, in this case, federal law preempts California's overtime pay provisions." *Ibid.* The court concluded that petitioners' "challenges to Aubry's action on state law grounds must be directed to the state's agencies and courts." *Ibid.*[8]

b. With respect to the issue of federal preemption, the court found the "general rule on preemption in admiralty" to be "that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." Pet. App. A26. It held that respondent's actions satisfied both requirements under the very narrow circumstances of this case.

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[7] The United States filed an amicus brief in support of respondents in the Ninth Circuit.

[8] The court also found that it was not required to abstain from considering petitioners' claim for declaratory and injunctive relief against the state proceedings. Pet. App. A33 n.22. Although the court observed that in some circumstances "comity requires that federal courts abstain from considering actions for declaratory and injunctive relief against state proceedings," it concluded that deciding the federal issue would not unduly interfere with those proceedings. *Ibid.*

With respect to the first prong of this test, the court found that "[m]aritime statutes do not apply to maritime employees, like these, who are not on vessels making foreign, intercoastal, or coastwise voyages"; that the FLSA savings clause, 29 U.S.C. 218(a), "specifically allow[s] states to enforce overtime laws more generous than the FLSA";[9] and that there is "no indication that Congress intended that maritime employees not benefit from more generous state wage and hour laws." Pet. App. A27. Thus, the court concluded, "California's attempt to supplement federal law in this case does not present an irreconcilable conflict with the statutory maritime law or with the FLSA; it does not 'contravene the essential purpose expressed by an act of Congress.'" *Ibid.*

The court also concluded that application of California's overtime pay laws "does not unduly disrupt federal admiralty law and, for that reason, is not constitutionally invalid." Pet. App. A35. Balancing "federal and state interests involved in application of the overtime provisions," the court determined "that the balance tips in favor of California in this case." *Id.* at A31-A32. The court determined that "application of the state's overtime law will not disrupt international or interstate commerce" because the vessels in question operate exclusively off the California coast and their crews consist of California residents. *Id.* at A34.

Judge Copple dissented. He would have held "that state laws mandating overtime pay are preempted by federal admiralty law" and by the FLSA. Pet. App. A42.

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[9] The court of appeals rejected the district court's characterization of the savings clause as an impermissible delegation of authority to prescribe maritime law. Rather, the panel stated, the savings clause simply makes clear Congress's "intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards." Pet. App. A25.

DISCUSSION

This case presents difficult and novel issues concerning a State's exercise of its traditional powers to regulate the minimum wages of its citizens in the context of maritime employment. Under this Court's cases, the decisive question—under the particular circumstances presented here—is whether the State's assertion of authority impermissibly interferes with the "proper harmony and uniformity" or the "characteristic features" of general maritime law. On the specific facts of this case, we believe that the court of appeals correctly concluded that the State's assertion of authority was not unconstitutional. Furthermore, although this Court may ultimately need to resolve the issues presented, we do not believe that review is necessary at this time. Rather, it would be appropriate to defer judgment on the constitutional question resolved by the court of appeals at least until potentially dispositive state law issues have been addressed by the California state courts.

1. The permissible scope of the States' role in regulating maritime activity has been a recurring issue in this Court. The general principles applicable to this case are, accordingly, well established.

a. Article III extends the judicial power to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2, Cl. 1. This jurisdictional grant empowers "the federal courts in their exercise of the admiralty and maritime jurisdiction * * * to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction,' and to continue the development of this law within constitutional limits" and also empowers "Congress to revise and supplement the maritime law within the limits of the Constitution." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959).

It is also firmly established, however, that States retain authority to act on a variety of issues within the scope of federal admiralty jurisdiction. As this Court explained in *Romero*, 358 U.S. at 373-374: "It is true

that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope." Consequently, maritime law has often been "modified or supplemented by state action." *Just* v. *Chambers*, 312 U.S. 383, 388 (1941).[10]

b. In defining the role that state law may properly play in the maritime context, this Court has made clear that state law may be preempted in either of two ways:

First, a federal statute has the same preemptive effect in the maritime setting as in any other context. Thus, under this Court's familiar formulation, the federal statute may expressly preempt state law; it may occupy the field to the exclusion of state law; and state laws that are inconsistent with the federal statute or that stand as an obstacle to Congress's objectives are invalid. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

Second, in the seminal case of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court recognized a further limitation on state authority in the maritime context. In *Jensen*, a New York dockworker was killed in the course of moving cargo from a vessel engaged in the interstate shipment of goods. His survivors thereafter sought compensation under the New York Workers' Compensation Act. This Court held that the state statute could not be applied to the accident. While recognizing that "general maritime law may be changed, modified, or affected by state legislation * * * to some extent," the Court declared (244 U.S. at 216):

> [N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with

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[10] See, *e.g.*, *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

> the proper harmony and uniformity of that law in its international and interstate relations.

As *Jensen* made clear, that limitation on state authority is comparable to the one derived from the so-called "dormant Commerce Clause." [11]

c. As the Court's subsequent decisions in the area of workers' compensation reflect, the so-called "*Jensen* line"—between matters governed exclusively by uniform federal maritime law and matters on which States may act—is difficult to discern.[12] The Court has cautioned

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[11] The Court explained in *Jensen* (244 U.S. at 216-217):

> A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation * * * between the States, Congress can alone act upon it and provide the needed regulations." * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.

See *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. at 443 (noting that state statute may be unconstitutional if "unduly burdensome on maritime activities or interstate commerce"). See also *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) (the Commerce Clause itself "is 'a limitation upon state power even without congressional implementation'" and "requires that some aspects of trade generally must remain free from interference by the States").

[12] Although *Jensen* could have been read to preclude application of state workers' compensation statutes to any injuries on navigable waters, this Court later held that state law would govern accidents occurring on such waters that were "local matters." *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 477 (1922). After a period in which the Court had difficulty in clarifying the scope of that exception to *Jensen*, it then recognized a "twilight zone" in which an injured maritime employee could invoke either state workers' compensation statutes or the federal Longshore and Harbor Workers' Compensation Act. See *Davis* v. *Department of Labor & Indus.*, 317 U.S. 249, 256 (1942); *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962).

against reading *Jensen* too broadly,[13] but it has not retreated from the core principle articulated in that case—that state law may not interfere with the "characteristic features of the general maritime law" or "the proper harmony and uniformity of that law in its international and interstate relations." See, *e.g.*, *Director, Office of Workers' Compensation Programs* v. *Perini North River Assocs.*, 459 U.S. 297, 306 & n.14 (1983); *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 717-719 (1980); *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. at 337-339, 344; *Just* v. *Chambers*, 312 U.S. at 389.[14]

Various forms of state regulation have been upheld under this test. As this Court noted in *Askew*: "State-created liens[,] * * * [s]tate remedies for wrongful death and state statutes providing for the survival of actions[,] * * * [s]tate rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted wtih a rule of maritime law which did not require uniformity." 411 U.S. at 338, quoting *Romero*, 358 U.S. at 373-374.

The import of these decisions is that every attempt by the States to regulate maritime activity must be carefully examined on its own facts. We therefore turn to the question of whether application of state overtime compensation laws to the vessels in issue is foreclosed either because: (1) a federal statute, here the FLSA,

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[13] See *Standard Dredging Corp.* v. *Murphy*, 319 U.S. 306, 309 (1943); *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. at 344.

[14] Cases applying that general principle to specific situations are legion. See 1 S. Friedell, *Benedict on Admiralty* §§ 112-113 (rev. 7th ed. 1992) (collecting cases in which state law has and has not been preempted).

preempts state law; or (2) the application of California's laws to the circumstances of this case unduly interferes with maritime uniformity under *Jensen*.

2. The court of appeals' basic conclusion—that the FLSA does not preempt California's overtime statute—is required by the statutory language itself. That conclusion is also fully consistent with this Court's precedents.[15]

a. The literal language of the FLSA's savings clause, 29 U.S.C. 218(a), forecloses petitioners' claim of statutory preemption. That Section states that "[n]o provision" of the FLSA—a reference broad enough to encompass both the exemption for "seamen" and the Act's overtime provisions as applied to other maritime employees—shall excuse noncompliance with "any * * * State law" establishing higher minimum wages or more generous overtime protection. Congress scarcely could have expressed its intention to preserve state law more clearly. Cf. *Standard Dredging Corp.* v. *Murphy*, 319 U.S. 306, 310 (1943) (rejecting the contention that an exemption from federal Social Security taxes for persons employed "as an officer or member of the crew of a vessel on the navigable waters of the United States" preempted state unemployment insurance taxes).[16]

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[15] In the courts below, petitioner Tidewater also relied on 46 U.S.C. 8104, a provision of the Shipping Act which regulates the maximum number of hours that seamen may work aboard certain United States-documented vessels. 91-142 Pet. 6, 26, 29. Both the district court (Pet. App. A59-A60) and court of appeals (*id.* at A12-A14) concluded that this provision does not preempt state laws requiring overtime pay for those working fewer hours. Neither petition seeks further review of that determination. Similarly, issues concerning federal regulation of the minimum manning requirements to certain commercial vessels are not at issue. State regulation of this issue would present a very different question from the one presented here.

[16] Federal and state courts have uniformly construed 29 U.S.C. 218(a) to preserve state laws from claims that they are preempted

b. This Court's decisions in *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Oil Workers Int'l Union* v. *Mobil Oil Corp.*, 426 U.S. 407 (1976); and *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986), do not suggest a different conclusion. In *Knickerbocker Ice*, the Court struck down a federal statute that purported to authorize application of state workers' compensation laws beyond the "*Jensen* line"—*i.e.*, to the area in which this Court had already held that application of state law would interfere unduly with the uniformity of federal maritime law. The savings clause in the FLSA is not subject to challenge on the same basis. It protects state laws from claims that they have been preempted *by the FLSA*; it does not purport to add to the authority States possess to enact maritime law or to protect such laws from *Jensen*-type preemption.

Although somewhat closer to the mark, *Mobil Oil* and *Tallentire* are also distinguishable. In *Mobil Oil*, the Court addressed a provision of the National Labor Relations Act that preserves certain state right-to-work laws. Section 8(a)(3) of that Act, 29 U.S.C. 158(a)(3), generally authorizes agency and union shop agreements, but a savings clause provides that "[n]othing in th[e] [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment *in any State*

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by FLSA exemptions. *Overnight Transp. Co.* v. *Tianti*, 926 F.2d 220, 222 (2d Cir.), cert. denied, 112 S. Ct. 170 (1991); *Pony Pettis Moving Co.* v. *Roberts*, 784 F.2d 439, 441 (2d Cir. 1986); *Maccabees Mut. Life Ins. Co.* v. *Perez-Rosado*, 641 F.2d 45, 46-47 (1st Cir. 1981); *Central Delivery Serv.* v. *Burch*, 355 F. Supp. 954, 958 (D. Md. 1973), aff'd mem., 486 F.2d 1399 (4th Cir. 1973); *Williams* v. *W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972); *Skyline Homes, Inc.* v. *Department of Indus. Relations*, 211 Cal. Rptr. 792, 799 (Ct. App. 1985); *Webster* v. *Bechtel, Inc.*, 621 P.2d 890, 896-900 (Alaska 1980); *Plouffe* v. *Farm & Ranch Equipment Co.*, 570 P.2d 1106, 1109 (Mont. 1977); *State* v. *Comfort Cab Co.*, 286 A.2d 742, 746-748 (N.J. Super. Ct. App. Div. 1972).

or Territory in which such execution or application is prohibited by State or Territorial Law," 29 U.S.C. 164(b) (emphasis added). In keeping with the highlighted phrase, this Court determined that the savings clause preserved state law only within certain territorial limits. Specifically, the Court held that "predominant job situs is the controlling factor in determining whether * * * a State can apply its right-to-work laws to a given employment relationship" and, accordingly, that no State could apply its right-to-work laws to employees who spent most of their time working on the high seas. 426 U.S. at 420.[17] There is no language in the FLSA's savings clause that places any comparable territorial limit on the state law it preserves. To the contrary, the FLSA provision protects "any * * * State law" providing minimum wages

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[17] In reaching that conclusion, the Court relied on several factors: (1) the fact that the savings clause, like the provision authorizing agency shop agreements, focuses on "*post*-hiring conditions of employment," which by their nature center on the job situs (426 U.S. at 417); (2) legislative history indicating that the validity of agency shop agreements was to be determined "under the laws of any State in which they are to be performed," presumably the job situs (*id.* at 418); and (3) two "practical considerations"—the propriety of "minimiz[ing] the possibility of patently anomalous extra-territorial applications of any given State's right-to-work laws" (*ibid.*) and promoting predictability regarding the legality of agency shop agreements (*id.* at 419). None of those factors was tied to the maritime character of the employment at issue.

In fact, the majority in *Mobil Oil* declined to adopt Justice Powell's suggestion, which parallels petitioners' position here, that the employees' status as seamen should be decisive. See 426 U.S. at 421 (Powell, Jr., concurring in the judgment) (urging that the NLRA savings clause should not apply to "employment contracts of maritime workers whose job situs is the high seas and who thereby enjoy a special status"). The Court also made clear that it was "creat[ing] no 'exemption' from § 14(b) for the maritime industry." *Id.* at 420 n.12.

Far from supporting petitioners' position, therefore, *Mobil Oil* indicates that a savings clause that is capable of applying in both the land-based and maritime settings should have the same basic effect in both contexts.

or overtime above the floor set by the FLSA, thereby preserving those laws to the fullest extent permissible.

Tallentire construed Section 7 of the Death On the High Seas Act (DOHSA), 46 U.S.C. 767, as a "jurisdictional savings clause" preserving the jurisdiction of the state courts over actions under that statute, as opposed to "a guarantee of the applicability of state substantive law to wrongful deaths on the high seas." 477 U.S. at 232. The Court chose from among those two alternatives on the basis of a detailed review of the drafting history of that Section in light of the maritime law prevailing at the time of its enactment. *Id.* at 220-233. In the course of this analysis, the Court found support for its choice in the "prevailing 'uniformity' doctrine" recognized by *Jensen*. See *id.* at 227. The Court did not suggest that a savings clause must invariably be construed to preclude application of state law in the maritime setting, and the FLSA's savings clause cannot be construed in a manner analogous to Section 7. Consequently, *Tallentire* does not support petitioners' position.

3. Because the FLSA neither adds to nor detracts from the authority States otherwise possess to apply their overtime laws to maritime workers, the issue of *Jensen* interference must be addressed. As set forth above, *Jensen* requires preemption if application of California's statute to the workers at issue here "works material prejudice to the characteristic features of the general maritime law" or "interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216; *Just* v. *Chambers*, 312 U.S. at 388 n.7, 389. The *Jensen* test is defined at such a high level of generality, however, that it provides very little guidance for determining when a State has exceeded its constitutional authority to regulate conduct. We are nevertheless persuaded—based on the precedents that have applied *Jensen*—that the court of appeals correctly concluded that the State's assertion of authority was constitutional on the specific facts of this case.

a. The Ninth Circuit's resolution of the *Jensen* issue derives strong support from several considerations. First, it is not clear that application of the State's overtime compensation rules to vessels that do not engage in interstate or foreign commerce disrupts the "uniformity" of maritime law "in its international and interstate relations." *Jensen*, 244 U.S. at 216. *Jensen* itself involved application of state law to the owner of a vessel engaged in *interstate* transportation of goods. The court of appeals' holding in this case is in fact limited to vessels whose significant contacts are all exclusively with California—*i.e.*, to vessels that "do not engage in foreign, intercoastal, or coastwise voyages." Pet. App. A9-A10 n.5. See also *id.* at A30-A37 (same).[18] Further, the employment relationship has strong ties to California. The employees at issue are all California residents who were hired in California, receive paychecks at California addresses, and pay California taxes. *Id.* at A7, A32, A34-A35, A37.

We recognize that the vessels in issue are not engaged in wholly "intrastate" activities because their operations are conducted at least in part on the high seas off the California coast. It seems to be more germane to this prong of the *Jensen* inquiry, however, that the vessels are not travelling to other state and foreign ports, where concerns of "uniformity" and conflicting legal requirements are more likely to come into play. Cf. *Miles* v.

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[18] The court expressly reserved the question whether respondent is "preempted by federal law from applying California's overtime pay laws to maritime employees employed primarily on the high seas on *coastwise* vessels engaged in *coastwise* voyages." Pet. App. A9-A10 n.5. It should be noted that some interstate and foreign voyages fall outside the definitions of "coastwise," "coastal," and "foreign" voyages—for instance, voyages between adjoining States, or between a State and Canada or Mexico. See note 2, *supra*. The court of appeals' reasoning, however, suggests that its holding would not reach vessels engaged in any interstate or foreign voyages. See *id.* at A34 (noting that application of State's law would not disrupt "international or interstate commerce").

Apex Marine Corp., 111 S. Ct. 317 (1991) (declining to adopt a rule of maritime law governing wrongful death actions that would distinguish between territorial waters and the high seas).

Second, it is not apparent that a uniform rule governing overtime pay is the kind of "characteristic feature[] of the general maritime law" (*Jensen*, 244 U.S. at 216) that precludes state law supplementation. As the cases cited by petitioners indicate (91-349 Pet. 11-12), admiralty courts have generally enforced the parties' bargain with respect to overtime, regardless of whether that bargain precluded or required overtime pay. Although petitioners emphasize that 12-hour shifts are standard in the industry, California does not prohibit that practice.

Finally, as the court of appeals correctly observed, States have a keen interest in protecting the welfare of their citizens through the adoption of overtime compensation laws. See *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) (upholding the States' constitutional authority to impose minimum wage requirements as an exercise of the police power). A State may refrain from regulating employment in the maritime industry for a variety of compelling reasons, but its underlying interest in protecting the wages of its citizens who work on board vessels is no different than its interest in protecting its citizens who work in factories.

b. That being said, there is, we believe, considerable force to petitioners' arguments that state law should not apply to their operations. The interest in the uniformity of maritime law has retained the greatest force with respect to "suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews." *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. at 344. In terms of their effect on vessels and their crews, overtime compensation laws are in many respects similar to the workers' compensation law at issue in *Jensen* itself, and the state statute of frauds that this Court held could not bar a seaman from recovering dam-

ages under an oral contract with a vessel owner in *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961).

This Court has nevertheless permitted some state regulation of the relationship between the vessel and its crew. In *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306 (1943), the Court found that application of a state unemployment insurance statute to vessels employing seamen off the coast of New York was not "destructive of admiralty uniformity." *Id.* at 309. The Court found that *Jensen* invalidated a State's efforts to provide workers' compensation remedies because they "interfered with the existing admiralty system of relief," *ibid.*, but that no similar argument could be made with respect to the imposition of taxes on vessels to provide unemployment compensation for workers. Similarly, *Kossick* can be read to mean only that the state law of contracts should not be invoked to directly prohibit a method of contracting—the use of oral agreements—that had been widely used in maritime commerce.

In contrast, California's overtime compensation requirement simply imposes a financial burden on the vessel owner as a nondiscriminatory exercise of the State's police power in furtherance of the public welfare of its citizens. See, *Kossick*, 365 U.S. at 741 (emphasizing that the statute of frauds was a rule of contract law, not a "public regulation"). Requiring overtime compensation, as in *Murphy*, does not directly interfere with any rule of admiralty law or prohibit any method of contracting or navigating.[19]

We also recognize that application of state overtime statutes on the high seas is more likely to lead to the possibility for conflicts among state laws. See *Tallentire*, 477 U.S. at 213-214 (describing the consequences of efforts to apply state wrongful death statutes in that setting). When a State seeks to assert jurisdiction over a vessel based upon such factors as the residence of the

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[19] A state law imposing a maximum number of hours per shift would, in our view, pose a greater potential for direct interference.

members of the crew or contacts between the vessel and a State (rather than the vessel's exclusive presence in its territorial waters), the potential that more than one State will be in a position to assert such an interest is not difficult to envision. Although the court of appeals identified facts in this case that made such conflicts unlikely, the mobility of vessels, their potential for multiple uses, and the turnover in their crews may make those limitations hard to enforce in later cases. For these reasons, there is considerable force to the point that application of state overtime laws *could* lead to undue interference with the essential uniformity of federal maritime law.

4. States have seldom sought to regulate activities on the high seas and, to our knowledge, have never sought to regulate the overtime compensation of seamen and maritime employees. Although it is difficult to resolve the constitutionality of such state regulation under the imprecise standard adopted in *Jensen*, we do not believe that review of respondent's action is necessary at this time. In our view, several factors counsel in favor of deferring consideration of this question.

First, the state courts have not yet had an opportunity to consider petitioners' claims that the wage order in issue cannot properly be applied to maritime workers under state labor and administrative law. It does not appear that these claims are frivolous. As petitioners point out, the express terms of the wage order appear to be directed at "land-based" occupations, 91-142 Pet. 7; 91-349 Pet. 9; the order has never previously been applied to maritime workers, *ibid.*; the wage order was adopted by a separate agency, the Industrial Welfare Commission, after public rulemaking, 91-142 Pet. 7 n.9; and respondent's extension of the order to maritime workers was made without any period for notice and comment.[20] Petitioners have ac-

[20] Even the California Labor Commissioner has expressed uncertainty as to the category of maritime workers he will seek to protect under the law. Br. in Opp. 8, 12-14 (questioning whether, in

cordingly asserted that respondent failed to "comply with state administrative and procedural requirements regarding wage and hour rulemaking and law enforcement," Pet. App. A32; yet these claims have not been resolved because petitioners' challenges to the state administrative proceedings have been stayed pending the outcome of this case. Br. in Opp. 7.

This is not to suggest that in applying these regulations to petitioners' operations respondent exceeded his administrative authority. We suggest, more modestly, that the Court may wish to decline to consider whether respondent's actions were unconstitutional until after the state courts have had an opportunity to determine whether they were proper under state law. If the state courts conclude that respondent exceeded his authority under state labor or administrative law, then the constitutional issue will obviously be rendered moot.

Second, we are persuaded that the decision's potential for immediate disruption of maritime commerce is not sufficient to outweigh these countervailing prudential considerations. There is apparently no dispute that the issue is "novel," and that no other State has sought to apply its overtime compensation laws to maritime workers. Pet. App. A46; 91-142 Pet. 5 n.3. The vessel owners therefore cannot presently claim that they are being subjected to conflicting state law requirements. The Ninth Circuit in fact minimized the potential for such conflict by expressly limiting its decision to application of California's overtime rule to vessels that do not make interstate or foreign voyages.

Third, and relatedly, the Ninth Circuit is the first court of appeals to consider the issue presented. As a result, there is no disharmony, as yet, in the body of federal law. In addition, the analysis required by *Jensen* depends heavily on the nature of the burdens the state requirement imposes on maritime commerce. Consideration of the

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light of the court of appeals' limitations on relief, petitioners' "anticipated problems" with the ruling will ever arrive).

question might therefore be more informed after a greater opportunity for the courts to evaluate the practical impact of the specific regulatory efforts in issue. All in all, further review can appropriately wait for another day.[21]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[21] Principles of issue preclusion and stare decisis will limit the ability of some parties to relitigate this constitutional question in California. It would not appear likely, however, that further consideration of the issue will be totally foreclosed in future proceedings. Parties with proper standing who were not represented in this case could raise the constitutional question in state court proceedings. A judgment of the California court on the constitutional issue would then be subject to review on certiorari. Further, the issue would also be subject to review again in federal proceedings if respondent seeks to enforce the overtime laws to other vessels that present materially different facts.

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